**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.,<br><br>Plaintiffs,<br><br>v.<br><br>PROSPECT CHARTERCARE, LLC; ET AL.,<br><br>Defendants. | C.A. No. 1:18-CV-00328-WES-LDA |

**THE DIOCESAN DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDA REGARDING PLAINTIFFS' PENDING MOTION FOR SUMMARY JUDGMENT**

Plaintiffs have now filed forty-nine pages of briefing in response to the Court's request for "*brief*" memoranda (5 to 10 pages) addressing what to do with their pending Motion for Summary Judgment.

One thing is clear: Plaintiffs do not want to simplify this case, resolve a critical issue, and move forward. They are throwing everything and the kitchen sink at the Court—mootness, lack of case or controversy, the elements of judicial estoppel, the failure of the parties to brief the implications of the relief requested, etc. They even argue that the Diocesan Defendants[1] cannot affirmatively assent nor even stipulate to the relief that Plaintiffs themselves sought.[2]

[1] Defendants Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation, and Diocesan Service Corporation.

[2] The remaining parties appear to have a difference of opinion as to who rejected whose offer to mediate and at what period of time. After first learning of Plaintiffs' mediation with the Prospect Entities through the announcement of that settlement in January 2021, counsel for the Diocesan Defendants contacted Plaintiffs' counsel stating that the Diocesan Defendants were willing to mediate. Ex. A, Jan. 28, 2021 Email from Mr. Merten to Mr. Sheehan. Following some back and forth, Plaintiffs indicated that they were not interested in pursuing mediation. Ultimately, this is an irrelevant matter, as the parties have now agreed to mediate. The Diocesan Defendants are prepared to meet with Plaintiffs in good faith to determine if a reasonable resolution of this matter can be reached.

Indeed, Plaintiffs' intent with respect to this issue is revealed on the *forty-sixth* page of the forty-nine pages of briefing they submitted on this issue. Plaintiffs want to be able to backtrack and argue contrary factual and legal positions to those they took in response to this Court's stipulated case management order:

> … if and when Plaintiffs' other claims against the Diocesan Defendants are litigated, Plaintiffs will not be bound by the claim that "by April 29, 2013, at the latest, the St. Joseph Health Services of Rhode Island Retirement Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA."

Pls. Reply Mem. Concerning Mootness of Pending Mots. for Summ. J., ECF No. 224, at 15.

Plaintiffs contend "[t]he fact that Plaintiffs filed their motion in good faith and consistent with Rule 11 does not mean they would be unable to take the contrary position in good faith and consistent with Rule 11." *Id.* at 17. That is hogwash and it is harder to imagine a more transparent attempt at justifying vexatious litigation. They have filed substantial and voluminous statements of undisputed facts. They cannot back away from those. The Court has a full summary judgment record and must decide the issue pursuant to Rule 56. Fed. R. Civ. P. 56(e) advisory committee's notes to 2010 amendment ("Once the court has determined the set of facts—both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply—it must determine the legal consequences of these facts and permissible inferences from them.").

The arguments they press to avoid the ERISA determination they sought are patently off the mark.

1. Courts often grant unopposed motions for summary judgment on declaratory judgment claims. This Court has done it. *Fed. Nat'l Mortg. Corp. v. Gonsalves*, No. 17-390 WES, 2018 WL 2994399, at *1 (D.R.I. Jun. 14, 2018) (Smith, C.J.) (accepting and adopting report and recommendation that the Court grant a partially assented-to motion for

summary judgment on complaint for declaratory judgment); *see also Airway Leasing LLC v. MTGLQ Invs., L.P.*, No. 18-516 JJM, 2021 WL 1163008 at **2-4 (D.R.I. Mar. 26, 2021) (recommending grant of unopposed motion for summary judgment on all counts including declaratory judgment count). These brief decisions are enclosed for the Court's convenience at Exhibit B.

The obvious response to Plaintiffs' lengthy exegesis on mootness and cases or controversies is that their arguments miss the most critical part of this current dispute – the Church Plan/ERISA issue must be decided at some point in this still extant case and controversy. It can either be decided now, pursuant to the Court's scheduling order agreed to by the parties or at some other point in the distant unknown. But as the Court made clear, this issue needs to be decided. Indeed, the Court raised its concern that the Church Plan/ERISA issue must be decided very early on in this case. On February 12, 2019, when it first dealt with settlement approvals, the Court asked Plaintiffs when they had to make a choice on this very issue. *See* Ex. C, Tr. of Hr'g on Mot. for Preliminary Settlement Approval, Feb. 12, 2019, 14:7-18:3. At one point, the Court declared, "Can't stay on the fence all the way to trial." *Id.* 39:20-40:5. Apparently, Plaintiffs wish to do precisely that.

The Court has complete and fulsome submissions it can review. *C.f. Airway Leasing LLC*, 2021 WL 1163008 at *2 (court can decide unopposed motion for summary judgment where submissions demonstrate moving party has met its burden). More important, Plaintiffs' submission came as a result of an agreed-upon case management order that was expressly designed to resolve issues and clarify the central issue of when the St. Joseph Health Services of Rhode Island Retirement Plan became subject to ERISA. Stipulation & Proposed Order Concerning Limited Discovery & Related Summ. J. Mots., ECF No. 170 (entered via text

order on October 29, 2019). *Plaintiffs* declared that date should be April 29, 2013 at the latest and submitted memoranda and exhibits to substantiate that claim. The only remaining parties to this litigation, the Diocesan Defendants, did not object to that motion or suggest an alternative date. They simply said they wanted this issue decided. This Court has ample authority to limit and resolve issues via the processes and orders adopted in this case. *See, e.g.*, Fed. R. Civ. P. 1, 16, & 56(f)-(g).

2. Courts not only accept stipulations and the assent of the parties to narrow issues, they affirmatively pursue and encourage them. That is precisely what happened here. The Court prompted the parties to come up with a means to simplify the issues in the case. They did and the Court approved that proposal—resolve the Church Plan/ERISA issue. As Plaintiffs stated in their Motion for Summary Judgment: "… the parties have stipulated that the issues raised by this motion can and should be addressed by this motion for summary judgment." Pls.' Mot. for Summ. J., ECF No. 173, at 14. It is an odd circumstance indeed that, in this context, the Court is now faced with one party stipulating to a determination that the moving party sought and which that moving party is now struggling to defeat that relief.

Plaintiffs' argument that the Court can neither decide a fully briefed motion submitted to it pursuant to its prior case management order nor accept the Diocesan Defendants' stipulation to the relief Plaintiffs sought goes too far. A stipulation and assent to relief does not moot an issue or eliminate the Court's constitutional authority to decide the issue or accept that agreement. The Court accepts admissions and stipulations all the time in litigation. The Court looks for agreement, or lack of dispute, when it hears and resolves motions big and small, sets its calendar, decides on the scope of discovery, determines what issues merit a trial, etc.

3. Plaintiffs' arguments that the Court cannot adopt the relief Plaintiffs sought and the Diocesan Defendants accept because the full implications of that relief have not been briefed just plain ignores the purpose and effect of the prior court order. That order was designed to resolve the Church Plan/ERISA issue first and ***then*** determine where to go from there. An entire paragraph of that order is devoted to just that process. ECF No. 170 at ¶ 4.

**CONCLUSION**

This much can be said with absolute certainty. Adopting the resolution Plaintiffs sought—and to which the Diocesan Defendants stipulate and assent—comports with the Court's and parties' intentions two years ago and simplifies and clarifies the issues in this case going forward. Equally certain, Plaintiffs' desired outcome—resolves nothing and, indeed, allows Plaintiffs to contradict the factual and legal positions they have taken in response to the Court's stipulated order—leaves this case more muddled and confused, renders the last two years a complete waste of time, and keeps open an issue that will need to be decided by this Court at some point (which is precisely why the issue is not moot).

Respectfully Submitted,

ROMAN CATHOLIC BISHOP OF PROVIDENCE, A CORPORATION SOLE, DIOCESAN ADMINISTRATION CORPORATION and DIOCESAN SERVICE CORPORATION

By Their Attorneys,

PARTRIDGE SNOW & HAHN LLP

*/s/ Howard Merten*
Howard Merten (#3171)
Eugene G. Bernardo II (#6006)
Paul M. Kessimian (#7127)
Christopher M. Wildenhain (#8619)
40 Westminster Street, Suite 1100
Providence, RI 02903
(401) 861-8200
(401) 861-8210 FAX
hmerten@psh.com
ebernardo@psh.com
pkessimian@psh.com
cwildenhain@psh.com

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of September, 2021, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

*/s/ Howard Merten*

4110544.3/1444-35

# EXHIBIT A

## Merten, Howard

**From:** Merten, Howard
**Sent:** Thursday, January 28, 2021 6:13 PM
**To:** spsheehan@wistbar.com
**Cc:** Bernardo II, Eugene G.
**Subject:** SJHSRI

**FilingDate:** 1/29/2021 9:01:00 AM

Steve, following up on our call last week, we have inquired about mediation. Our client is willing to proceed to mediation with Mr. Isserlis. Assuming your side is interested, we can reach out to Isserlis and find mutually acceptable dates.

Howard

# EXHIBIT B

2018 WL 2994399
Only the Westlaw citation is currently available.
United States District Court, D. Rhode Island.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff,

v.

Vannessa GONSALVES, as Guardian of the Person and Estate of Paulo J. DeSousa, an Incompetent Person; and Tammie Clements, Defendants.

C.A. No. 17-390 WES
|
Signed 05/21/2018
|
Filed 06/14/2018

**Attorneys and Law Firms**

Ethan Z. Tieger, Samuel C. Bodurtha, Hinshaw & Culbertson LLP, Providence, RI, for Plaintiff.

Michael Zabelin, Rhode Island Legal Services, Inc., Providence, RI, for Defendants.

Vannesa Gonsalves, East Providence, RI, pro se.

**ORDER**

William E. Smith, Chief Judge

***1** In a Report and Recommendation ("R&R") filed on May 21, 2018 (ECF No. 20), Magistrate Judge Patricia A. Sullivan recommended that the Court grant Plaintiff's partially assented-to Motion for Summary Judgment (ECF No. 16). After carefully reviewing the R&R and the relevant papers, and having heard no objections, the Court ACCEPTS the R&R (ECF No. 20) in its entirety and adopts its recommendations and reasoning. Therefore, Plaintiff's Motion for Summary Judgment (ECF No. 16) is GRANTED, and the case dismissed.

IT IS SO ORDERED.

**REPORT AND RECOMMENDATION**

PATRICIA A. SULLIVAN, United States Magistrate Judge

This matter is before the Court for report and recommendation on Plaintiff's partially assented-to Motion for Summary Judgment on Count I of its complaint for declaratory judgment to rescind foreclosure. ECF No. 16. Plaintiff, Federal National Mortgage Association ("Fannie Mae") filed its complaint, ECF No. 1, following an August 2016 foreclosure sale on property, located at 125 Frederick Street, East Providence, Rhode Island, which was co-owned by Defendants joint-tenants Vannessa Gonsalves, as guardian for the owner of record Paulo J. DeSousa, and by Tammie Clements. At the time of the foreclosure and subsequent sale, Fannie Mae's loan servicing entity[1] provided notice only to Vannessa Gonsalves. Fannie Mae filed its present complaint in order to rescind the foreclosure deed recorded after the improperly-noticed sale, which would clear the way for a judicial foreclosure proceeding. ECF Nos. 1, 12.

Following the filing of its complaint, Defendant Vannessa Gonsalves, who is proceeding *pro se*, filed an Assent to Relief Sought by Plaintiff Federal National Mortgage Association, ECF No. 9, in which she states at paragraph 3, "Gonsalves assents to the relief sought by Fannie Mae in Count I of the Complaint." Fannie Mae asserts in its present motion that it has now located and obtained the assent of Defendant Tammie Clements to summary judgment. ECF No. 16 at 1. Moreover, Defendant Clements has filed an Answer to the Complaint, indicating that she admits to its salient allegations. ECF No. 14 ¶¶ 23-26. Given the assent of Defendants, along with the affidavit provided by Fannie Mae's counsel, providing and attesting to the authenticity of the mortgage documentation, ECF No. 19, this Court finds that Plaintiff's motion is sufficiently supported by the facts and the law.

Based on the foregoing, I recommend that Plaintiff's Motion for Summary Judgment on Count I of its complaint be granted. ECF No. 16. As Plaintiff's complaint contains only one count, this represents the dismissal of the case in its entirety. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor

Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

**All Citations**

Not Reported in Fed. Supp., 2018 WL 2994399

Footnotes

1 While Fannie Mae obtained an assignment of the mortgage from Santander Bank in 2015, Santander retained loan servicing responsibilities, along with its counsel, Harman Law Offices. ECF No. 1 ¶¶ 16-19.

**End of Document**

2021 WL 1163008
Only the Westlaw citation is currently available.
United States District Court, D. Rhode Island.

AIRWAY LEASING, LLC, Plaintiff,

v.

MTGLQ INVESTORS, L.P.,

SunTrust Mortgage, Inc.,[1]

Mortgage Electronic Registration System, Inc. and Federal National Mortgage Association, Defendants.

and

MTGLQ Investors, L.P.,

Third-Party Plaintiff,

v.

Rocco A. DeLuca, II, Ann-Marie DeLuca a/k/a Ann Marie K. DeLuca, and R.J.R. Realty Co., Third-Party Defendants.

C.A. No. 18-516JJM

|

Signed 03/26/2021

**Attorneys and Law Firms**

Nicholas J. Hemond, James G. Atchison, DarrowEverett LLP, Providence, RI, August Bigos, Richard W. Nicholson, Nicholson & Associates, LLC, Smithfield, RI, for Plaintiff.

Steven J. Boyajian, Robinson & Cole LLP, Providence, RI, Bethany M. Whitmarsh, Shanna M. Boughton, McGlinchey Stafford, PLLC, Boston, MA, for Defendants.

**REPORT AND RECOMMENDATION REGARDING MTGLQ INVESTORS, L.P.'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT**

PATRICIA A. SULLIVAN, United States Magistrate Judge.

***1** Pursuant to a scheme concocted by an attorney who subsequently withdrew from this case because of conflicts of interest,[2] in February 2017, Plaintiff Airway Leasing, LLC ("Airway"), purchased the real estate in issue in this case (721 Woodward Road in North Providence, the "Real Estate") from Ann Marie DeLuca and Rocco DeLuca ("the DeLucas") for $25,000, a fraction of its fair market value, and, as Airway was fully aware, subject to a mortgage given by the DeLucas in 2008 in connection with a $333,000 loan (the "Mortgage"). MTGLQ's Statement of Undisputed Facts, ECF No. 110 ("SUF") ¶¶ 1, 2, 20-27; ECF No. 110-1 at 2.[3] The Mortgage has been in default since 2012. SUF ¶¶ 6, 19; Second Amended Verified Complaint ("SAC"), ECF No. 13 ¶ 19. As of February 2021, the total arrearage secured by the Mortgage is $497,088.60. SUF ¶ 5.

Seeking an unblemished title unencumbered by the Mortgage, Airway sued to quiet the title and discharge the Mortgage. ECF No. 13. As Defendants, it named the current holder of the Mortgage, MTGLQ Investors, L.P. ("MTGLQ"), as well as all the prior holders of the Mortgage.[4] Id. Airway alleged that a deed in the DeLucas' chain of title from 1985, which conveyed what is now the Real Estate from Jennie Caranci to R.J.R. Realty Co. ("Caranci Deed"), has a fatally vague property description,[5] rendering the DeLucas' title defective and voiding the Mortgage that the DeLucas subsequently executed in 2008. Id. ¶¶ 10-11. In response, MTGLQ counterclaimed; Count II of the counterclaim seeks a judicial declaration, pursuant to R.I. Gen. Laws 9-30-1, *et seq.*,[6] that MTGLQ has a viable interest in the Real Estate as the holder of the Mortgage, which is valid and enforceable. ECF No. 6, Counterclaim II ¶¶ 25-27.[7] MTGLQ also brought the DeLucas, and tried to bring R.J.R. Realty Co. ("RJR"),[8] into the case as third-party defendants, seeking to reform the Caranci Deed.[9] ECF No. 10. The DeLucas crossclaimed against Truist, but not against MTGLQ. ECF No. 72.

***2** Now pending before the Court is MTGLQ's unopposed Motion for Summary Judgment filed on February 22, 2021. ECF No. 109. The Motion seeks summary judgment against Airway in connection with all its claims against MTGLQ, as well as declaratory judgment in MTGLQ's favor on Count II of its Airway counterclaim. ECF Nos. 109; 109-1 at 5.

In ruling on a Fed. R. Civ. P. 56 motion for summary judgment, the court must examine the record evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000). There are no trial-worthy issues unless there is competent evidence to enable a finding favorable to the nonmoving party. Goldman v. First Nat'l Bank of Bos., 985

F.2d 1113, 1116 (1st Cir. 1993). That is, the nonmoving party cannot rest on its pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Id. (cleaned up). This approach does not change for unopposed motions because the "failure of the nonmoving party to respond to a summary judgment motion does not in itself justify summary judgment." Lopez v. Corporación Azucarera de P.R., 938 F.2d 1510, 1517 (1st Cir. 1991). "It is well-settled that before granting an unopposed summary judgment motion, the court must inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law." Aguiar-Carrasquillo v. Agosto-Alicea, 445 F.3d 19, 25 (1st Cir. 2006) (cleaned up).

MTGLQ's Motion is based on the following undisputed facts:

- After the vaguely worded Caranci Deed to RJR in 1985, the DeLucas acquired their title to the Real Estate through a series of deeds directly or indirectly from RJR; each of these clearly describes the portion of the Real Estate conveyed by metes and bounds. By 2002, all of the Real Estate was in the name of the DeLucas. SUF ¶¶ 1-17.

- The DeLucas – continuously, exclusively, openly, notoriously and adversely to any claim of Jennie Caranci or her successors – possessed and occupied most of the Real Estate ("Parcel A") from 1986 until 2017 and the remainder ("Parcels C and D") from 1998 until 2017, so that the DeLucas acquired title to all of the Real Estate by adverse possession. SUF ¶¶ 9-17, 25; SAC, ECF No. 13 ¶ 46.

- Neither Jennie Caranci nor any successor of Jennie Caranci has ever challenged the DeLucas' title to the Real Estate. ECF No. 106 at 12.[10] The DeLucas' 2016 attempt to locate any Jennie Caranci successors was unsuccessful. Truist/MERS SUF ¶ 40.[11]

- In June 2008, the DeLucas borrowed $333,000 from Truist, secured by the Mortgage on the Real Estate in which they warranted the title, covenanting that "Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant, and convey the Property." SUF ¶ 1; ECF No. 110-1 at 4.

- Through a chain of assignments, as of 2013, the Mortgage and underlying note were held by FNMA. SUF ¶ 4; Truist/MERS SUF ¶ 32.

- During 2016, the DeLucas negotiated regarding the possibility of entering into an agreement with FNMA, whereby they could deed away the Real Estate in lieu of foreclosure. After the vague description in the Caranci Deed was discovered, FNMA elected not to proceed with a deed in lieu of foreclosure. SUF ¶ 19; Truist/MERS SUF ¶¶ 37-40.

***3** • In 2015, Rocco DeLuca conveyed his interest in the Real Estate to his wife, Ann-Marie DeLuca by quitclaim deed. On February 10, 2017, both DeLucas re-conveyed the Real Estate to Ann-Marie DeLuca by a corrective quitclaim deed and she immediately conveyed the Real Estate to Airway for $25,000 by quitclaim deed. SUF ¶¶ 18, 23-25.

- In July 2017, FNMA assigned the Mortgage to MTGLQ. SUF ¶ 4; Truist/MERS SUF ¶ 42.

- At all relevant times, Airway had actual notice of the Mortgage and its default status. SUF ¶ 24. Further, after the 2017 conveyance of the Real Estate to Airway, Airway made substantial improvements to the Real Estate (spending more than $100,000) while it was fully aware of the risks of these undertakings in light of the Mortgage. SUF ¶ 27.

Airway and the DeLucas originally had until March 8, 2021, to file their opposition to the MTGLQ Motion. Their motion to extend was granted, pushing the deadline to March 15, 2021. Text Order of March 9, 2021. As of this writing no opposition or response to the Motion or to MTGLQ's Statement of Undisputed Facts has been filed.

In the unopposed Motion, MTGLQ argues that it is entitled to summary judgment because Airway's attack on the viability of the Mortgage fails as a matter of law based on undisputed facts establishing that, whether or not the Caranci Deed was fatally defective (which MTGLQ does not concede),[12] by 2008, when the DeLucas gave the Mortgage to Truist with warranties of title, they had already acquired title to most of the Real Estate based on their adverse possession of "Parcel A" for well more than ten years, pursuant to R.I. Gen. Laws § 34-7-1. See DiPippo v. Sperling, 63 A.3d 503, 508 (R.I. 2013). Within a few months of signing the Mortgage, the DeLucas' title by adverse possession ripened as to the balance of the Real Estate ("Parcels C and D").[13] SUF ¶¶ 1, 11-12. Rhode Island law contemplates that such adverse possession is intended to provide a cure for just this kind of circumstance. See Union Sav. Bank v. Taber, 13 R.I. 683, 695 (1882)

("prominent purpose" of adverse possession statute is "to make time the healer of precisely such defects as are the cause of the difficulty here, namely, defects of conveyancing"). Therefore, any potential defects in the Caranci Deed do not affect the viability of the Mortgage as to any part of the Real Estate. See Note Cap. Grp., Inc. v. Perretta, 207 A.3d 998, 1005 (R.I. 2019) (doctrine of estoppel by deed "provides that an assignor of an interest in property (such as a mortgage), despite lacking an actual interest in the property at the time of the transfer, is prevented from denying the validity of the transfer if the assignor later acquires an interest in the property").

***4** Relatedly, Airway's argument that it can challenge the validity of the Mortgage or assert the DeLucas' ongoing adverse possession after 2008 against the Mortgage also fails. Rhode Island law is clear that, because the DeLucas covenanted to warranties of title in the Mortgage, as their successor, Airway cannot assert adverse possession against the DeLucas' mortgagee, Truist, or against any of its successors, including MTGLQ, nor can it otherwise claim that the Mortgage is invalid. See IDC Props., Inc. v. Goat Island S. Condo. Ass'n, Inc., 128 A.3d 383, 391 (R.I. 2015) (doctrine of estoppel by deed bars grantor from proclaiming invalidity of warranty deeds to purchasers of condominium interests given twenty years earlier); Carrozza v. Carrozza, 944 A.2d 161, 166 (R.I. 2008) (grantor who conveys via warranty deed "cannot, at some later date, reassert the validity of his title in the property against a grantee or the grantee's successors in interest"); Lewicki v. Marszalkowski, 455 A.2d 307, 308 (R.I. 1983) ("individual who conveys a parcel of Rhode Island real estate to another by warranty deed" cannot later "claim title to the identical parcel against the grantee's successor by way of adverse possession").

Before closing, I turn to Airway's claim that MTGLQ knew of the title defect caused by the Caranci Deed and yet attempted to foreclose on the Mortgage despite Airway having "spent $130,000.00 renovating the interior and exterior of the [Real Estate]." SAC, ECF No. 13 ¶ 35; see also ¶¶ 33-34. While the Complaint is vague in translating these factual allegations into a claim, read liberally, the pleading appears to assert that, if the Mortgage is valid and enforceable, Airway is entitled to be compensated by MTGLQ for these expenditures. With Airway's admission that it was fully aware of the Mortgage (and with the undisputed facts establishing that Airway was warned by the DeLucas (*non-attorneys*) about pouring money into the Real Estate before addressing the Mortgage), this claim fails as a matter of law because there are no facts that establish any basis for holding MTGLQ responsible for such expenses. See, e.g., Smith v. Sherwood & Roberts, Spokane, Inc., 441 P.2d 158, 165 (Idaho 1968) ("that a mortgagee receives on foreclosure the benefit of repairs previously done to the mortgaged property does not in itself render the mortgagee liable for the value of the repairs").

Based on the foregoing, in reliance on the undisputed facts and on MTGLQ's well-founded legal arguments, I recommend that MTGLQ's unopposed Motion for Summary Judgment (ECF No. 109) be granted. Specifically, I find that all of Airway's claims against MTGLQ fail as a matter of law and that judgment should enter in MTGLQ's favor. Further, because this dispute is an "actual controversy within" the Court's diversity jurisdiction so that declaratory judgment is appropriate, 28 U.S.C. § 2201(a), and in reliance on the same undisputed facts and legal principles, I find that MTGLQ has established that the Mortgage is viable and recommend that the Court grant the relief sought by MTGLQ in Count II of its counterclaim – a judicial declaration confirming the interest of MTGLQ in the Real Estate as the holder of the Mortgage, which is valid and enforceable.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

**All Citations**

Slip Copy, 2021 WL 1163008

Footnotes

1 SunTrust Mortgage, Inc., is now known as Truist Bank. ECF Nos. 89; 110 ¶ 1 n.1.

2 The scheme is well described in MTGLQ's memorandum in support of its Motion for Summary Judgment. See ECF No. 109-1 at 11-14. It also is described in MTGLQ's Statement of Undisputed Facts. See ECF No. 110 ¶¶ 20-27. When the conflict of interest of the attorney was exposed during the Rule 16 conference, the Court managed his withdrawal

and the entry of successor counsel for Airway and of *pro se* appearances and the filing of an answer/crossclaim for the DeLucas. ECF Nos. 61-72.

3 Neither Airway nor the DeLucas responded to MTGLQ's Statement of Undisputed Facts; therefore, they are deemed admitted. DRI LR Cv 56(a)(3); see also Feliciano Rivera v. Med. & Geriatric Admin. Servs. Inc., 254 F. Supp. 2d 237, 239 (D.P.R. 2003) (in unopposed motion for summary judgment, non-moving party waives right to object to material facts set forth by movant).

4 Two of the prior holders of the Mortgage, Truist Bank ("Truist") and Mortgage Electronic Registration Systems, Inc. ("MERS"), have filed their own motion for summary judgment. ECF No. 106. The fourth entity sued by Airway, Federal National Mortgage Association ("FNMA"), has not joined either of the pending motions.

5 The Caranci Deed described the Real Estate by reference to Tax Assessor's Plat and Lot numbers only; it did not set forth a description based on metes and bounds. This Assessor's Plat, as it existed of record in 1985, cannot now be located.

6 A request for declaratory relief in a diversity action must be pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, rather than under R.I. Gen. Laws § 9-30-1, *et seq.* Tocci Bldg. Corp. of N.J., Inc. v. Va. Sur. Co., 750 F. Supp. 2d 316, 320 n.2 (D. Mass. 2010). This report and recommendation uses the federal statute.

7 MTGLQ included its counterclaims in the original answer and did not reassert them in its answer to the SAC. See ECF No. 37. With no objection from Airway or any other party to this approach, I also am untroubled by it. At bottom, to the extent that MTGLQ was required to reassert its counterclaims, the "liberal amendment policies of the Federal Rules of Civil Procedure would require allowing [MTGLQ] to amend its answer to do so." See Ely Holdings, Ltd. v. O'Keeffe's, Inc., No. 18-cv-06721-JCS, 2021 WL 390946, at *5 n.9 (N.D. Cal. Feb. 3, 2021).

8 The docket does not reflect that MTGLQ ever tried to serve RJR.

9 In its brief in support of the Motion, MTGLQ advised the Court that discovery has revealed that reformation of prior conveyances is unnecessary to confirm the validity of the Mortgage. ECF No. 109-1 at 15 n.6.

10 This proposition is stated as argument but is accepted as an undisputed fact because neither Airway nor the DeLucas have presented any factual material in opposition.

11 Like MTGLQ, MERS and Truist supported their motion for summary judgment with a Statement of Undisputed Facts, ECF No. 107 ("Truist/MERS SUF"). Because of a similar lack of opposition, those facts are also deemed to be admitted. DRI LR Cv 56(a)(3).

12 Alternatively, MTGLQ's Motion directs the Court to Rhode Island law on the interpretation of a vaguely worded real estate conveyance, which, MTGLQ argues, establishes that there is nothing *per se* wrong with the Caranci Deed. See Hall v. Nascimento, 594 A.2d 874, 875-76 (R.I. 1991) (court looked to surrounding circumstances to construe conveyance based on maps but without metes and bounds); Sullivan v. R.I. Hosp. Trust Co., 56 R.I. 253, 259, 185 A. 148, 151 (1936) (cleaned up) (construction of deed, generally, involves giving effect to intention of parties as gathered from deed together with "surrounding circumstances"). To the contrary, the Rhode Island Supreme Court has made clear that "[a] mortgage will not be held void for uncertainty, *even as to third persons*, where by any reasonable construction it can be sustained," including by reliance on "extrinsic evidence." Option One Mortg. Co. v. Aurora Loan Servs. LLC, 78 A.3d 781, 786 (R.I. 2013) (emphasis in original). Based on these principles and the undisputed facts, MTGLQ asks the Court to construe the Caranci Deed as conveying all of the Real Estate to RJR. I have not tried to wrangle with this alternative argument. Leaving this question open, I recommend judgment in favor of MTGLQ based on the overwhelming evidence of the DeLucas' adverse possession. If the District Court disagrees, MTGLQ remains free to assert this argument.

13 With no dispute regarding the facts establishing adverse possession, I find that MTGLQ's factual proffer readily clears the requirement that a "party who asserts that adverse possession has occurred must establish the required elements by strict proof, that is, proof by clear and convincing evidence." Corrigan v. Nanian, 950 A.2d 1179, 1179 (R.I. 2008) (cleaned up).

# EXHIBIT C

IN THE 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, | : | 18-CV-00328(WES) |
| | : | United States Courthouse Providence, Rhode Island |
| vs. | : | |
| Prospect CharterCARE,LLC, et al., Defendants. | : | Tuesday, February 12, 2019 10:00 a.m. |

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Plaintiffs:
MAX WISTOW, ESQ.
STEPHEN P. SHEEHAN, ESQ.
BENJAMIN G. LEDSHAM, ESQ.
Wistow, Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903

For the Receiver:
STEPHEN DEL SESTO, ESQ.
Pierce Atwood LLP
One Financial Plaza, 26th Floor
Providence, RI 02903

For the Defendants:
PRESTON W. HALPERIN, ESQ.
CHRISTOPHER J. FRAGOMENI, ESQ.
Shechtman Halperin Savage LLP
1080 Main Street
Pawtucket, RI 02860

JOHN McGOWAN, Jr., ESQ.
Baker & Hostetler LLP
Key Tower
127 Public Square, Suite 2000

For the Defendants:

Cleveland, OH 44114-1214
HOWARD A. MERTEN, ESQ.
PAUL M. KESSIMIAN, ESQ.
Partridge Snow & Hahn LLP
40 Westminster Street, Suite 1100
Providence, RI 02903

STEVEN J. BOYAJIAN, ESQ.
DANIEL F. SULLIVAN, ESQ
Robinson & Cole LLP
One Financial Plaza, Suite 1430
Providence, RI 02903

WILLIAM MARK RUSSO, ESQ.
Ferrucci Russo P.C.
55 Pine Street, 3rd Floor
Providence, RI 02903-2841

DAVID A. WOLLIN, ESQ.
Hinckley Allen & Snyder LLP
100 Westminster Street, Suite 1500
Providence, RI 02903

RICHARD J. LAND, ESQ.
Chace Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903

Court Reporter: Lisa Schwam, CSR, CRR, RPR, RMR
One Exchange Terrace
Providence, RI 02903

Proceedings recorded by computerized stenography. Transcript produced by Computer-Aided Transcription.

(In open court.)

THE COURT: All right. Good morning, everyone. We're here in the matter of Stephen Del Sesto as receiver and administrator of the St. Joseph Health Services of Rhode Island Retirement Plan vs. Prospect CharterCARE, LLC, et al., to hear a motion for preliminary settlement approval as well as other matters.

Let's have counsel identify themselves for the record.

MR. WISTOW: Max Wistow for the plaintiffs.

MR. LEDSHAM: Benjamin Ledsham for the plaintiffs.

MR. SHEEHAN: Stephen Sheehan for the plaintiffs.

MR. DEL SESTO: Stephen Del Sesto, the state receiver.

MR. HALPERIN: Preston Halperin for the Prospect entities.

MR. MCGOWAN: John McGowan for the Prospect entities, sir.

MR. MERTEN: Howard Merten for the Diocesan defendants.

MR. KESSIMIAN: Paul Kessimian for the Diocesan defendants.

MR. BOYAJIAN: Steven Boyajian for the Angell Pension Group, your Honor.

MR. SULLIVAN: And Dan Sullivan also for the Angell Pension Group.

MR. FRAGOMENI: Good morning, your Honor. Chris Fragomeni on behalf of the Prospect entities.

MR. RUSSO: Mark Russo for the Prospect entities, your Honor.

MR. WOLLIN: David Wollin for the Rhode Island Foundation, your Honor.

MR. LAND: Richard Land on behalf of CharterCARE Community Board and Roger Williams Hospital.

THE COURT: Thank you. So who else is going to be arguing today?

MR. WISTOW: May I address the Court on that issue, your Honor?

THE COURT: Yes. I'm listening. I'm just moving yesterday's piles while you come up, okay.

MR. WISTOW: Your Honor is kind of awash in briefs I'm afraid in this case.

THE COURT: Yes.

MR. WISTOW: I'm going to try to be brief in the hopes of obtaining forgiveness in part for all the materials we've dumped on you. I've talked to all defense counsel in the case and we've agreed, subject

to your Honor's approval, on how to address the issues before the Court this morning.

The objections to the motion to approve the partial settlement on a preliminary basis started off with regard to problems with ERISA and failure to join the Pension Benefit Guaranty program. And all counsel agree again, subject to your Honor's desires, to argue that issue independently first and then go on to -- and I would like Mr. Sheehan to argue that. Prospect has indicated they want Mr. McGowan to argue that separate issue. And then --

THE COURT: That issue is exactly what? How do you characterize that?

MR. WISTOW: That would be the issue of failure to join Pension Benefit Guaranty Corporation as a party and the general preemption of ERISA and how it affects the settlement without regard to any other issues.

Once that issue is addressed, there remains other objections by the non-settling defendants, and those other objections relate to whether this is a good faith settlement or not under the recently enacted joint tortfeasor statute that abolishes proportionality of fault as the basis for allocation between the parties. There's an objection based on collusion that would prevent a good faith finding. There's objections

based on the fact that part of the settlement between the pension plan and the proposed settling defendants violates the contract with some of the non-settling defendants and violates the Rhode Island Hospital Conversion Act.

I don't mean to be exhaustive, but your Honor could see those issues are quite different from whether or not the plan is preempted by ERISA and whether or not the case can go forward without PBGC. And it seems logical, I believe to all of us, we've agreed, if the Court would allow us to argue in that order.

THE COURT: I think that's fine. There might be some overlap, but I don't think it's -- I think this is very manageable the way you suggested it.

MR. WISTOW: Thank you, your Honor. With that, I would suggest that -- we are the movants -- I would suggest that Mr. Sheehan start with his arguments why the objections of Prospect CharterCARE and the Diocese with regard to the nonjoinder of PBGC, the Pension Benefit Guaranty Board, and the failure to bring them in as a party, means nothing both as to the original objection they filed and the surreply which your Honor allowed them to file on July 5th.

And he will also address the issues of whether, for example, the PBC statute allows the receiver to

have made the expenditures he made, whether or not the ERISA statute abolishes the collateral source rule and related concepts all peculiar to ERISA and the Pension Benefit Guaranty Corporation.

If your Honor would like, I can before that begins give you some of the travel of what happened, maybe that would be helpful, that got us where we are today. It's up to the Court. I'll try to be very brief in that regard. I suggest it might help.

THE COURT: I think I'm pretty familiar with the travel, but if you think there's material that I don't know or need to know, go ahead.

MR. WISTOW: Well, I'll try to be very brief, and I hope my definition of brief comports with your Honor's.

Your Honor knows that we're talking about a defined benefit pension plan established by St. Joseph's Hospital Society of Rhode Island, one of the purporting settling defendants, there's something like 2729 beneficiaries -- participants, I should say, in the plan plus members of their family who are dependent in part.

The SJHSRI which owned the old St. Joseph's Hospital lost -- transferred the assets of the old St. Joseph's Hospital in June 2014 to some new entities.

They no longer continue to operate a hospital business. They purported to keep with them the pension liability.

On August 17th, 2017, which is more than three years after the closing on June 20th, 2014, the original transfer, the receivership petition is filed in the Superior Court by SJHSRI as the petitioner. The respondent was the plan itself as the trust.

Most importantly, that petition alleged that the plan was insolvent and asked for an immediate reduction, 40 percent, in benefits and set that down for hearing October 11th, about six weeks after the notice -- after the petition. Our office was hired by the petitioner on October 17th, 2017. Needless to say, the reduction did not go forward on the 11th; it was just held in abeyance.

And this is going to become relevant later on different issues. Because of the difference of opinion of individual plan participants as to what their attitude was about a reduction, they went off into different groups. My job when I was hired was to try to maximize the total money in the plan, and it was clear that I would never get involved in how that would be split up if there were arguments among the various participants. Arlene Violet and Robert Senville -- Ms. Violet couldn't be here this morning, but

Mr. Senville is here and he has represented, noted his appearance previously in Superior Court at least to advocate for the older and more disabled pensioners. Jeff Kasle for the intermediate participants and Chris Callaci for the union. They represent hundreds and hundreds of different people in the plan. And I'll explain in a moment what happened in the superior court with them.

Again, I want to emphasize that if there's ever a shortfall with this plan, I will not in any way be involved in how will the shortfall be allocated among these people. That's strictly between the receiver and whoever their representatives are.

I was allowed to subpoena documents and during the eight months approximately that I was retained up until the time we brought suit, which was on June 18th, 2018, I wanted for my own legal reasons to bring that suit within four years of the anniversary date of the closing, June 20th, 2014. By September 4th, 2018, about two-and-a-half months later, we signed a settlement agreement with some of the defendants, namely, CharterCARE Community Board, the old Roger Williams Hospital and the old St. Joe's Hospital; some people call it Fatima.

In that settlement, the plan was to be given a

minimum of $11,150,000 or greater than 95 percent of the liquid assets. There was going to be an escrow -- a transfer of the escrow rights to another $750,000 of money held by the Rhode Island Department of Labor. There was a transfer of rights that CCB owned in an entity called CharterCARE Foundation which had received about $8.2 million as a result of a Cy Pres petition that took place some years ago but after the closing in 2015.

In addition and very important, the agreement provided that we would get all the rights that these settling defendants owned in the new entity PCC, LLC, which had been created as a parent to own the two new hospital corporations that would be operating, let's call it, new Fatima and new St. Joe's. And it's our position that CCB and its subsidiaries own at least 15 percent of the parent company of the operating hospitals.

One of the complicating factors in this thing, your Honor, is there's a put that CCB has to put the 15 percent to the sellers, but that put doesn't arrive until June 20th, '19. That's only four months from now. And the put is only good for 90 days. And if there can't be an agreement, then the matter has to go to arbitration.

The settlement agreement gives the receiver rights of how to control the put and how to participate in the arbitration subject at all times when it was entered into to approval by the superior court and then approval by this Court.

To finish up that pie, all of the items in the settlement agreement that were going to be given to us were stated to be presently held in trust for us and secured by the financing agreement at UCC-1. So what we ended up there, your Honor, is with a settlement agreement that in effect was an option on behalf of the receiver and the plan participants subject to approval of two courts, similar to perhaps you might analogize it to a purchase and sale of real estate where it's subject to planning board and zoning approval and the like but there's a present contract.

What they got in return, the settling defendants, were releases under the new joint tortfeasor release, and we'll get into that in some substance because they're complaining about that. In a nutshell, basically what the new joint tortfeasor does is what's been done in the state at least four times in the past -- there's a *Depco* case, the *Station* fire case, the *38 Studios* case -- it's abolished the pro rata share concept for joint tortfeasors and simply

given a credit for the amount paid if indeed it's a good faith settlement. That would put Rhode Island -- a little more than 50 percent of the American jurisdictions have statutes like that. For example, the Mass statute is like the statute that we're talking about here.

We still would reserve claims against the settling defendants to press in liquidation. They've agreed our request to go into a judicially supervised litigation, and they've agreed in addition to give us all their rights in CharterCARE Foundation which had gotten 8.2 million. And we're not releasing them from that nor releasing them from any assets in connection with the 2014 sale. I can categorize it simply as meaning mainly or fraudulent transfer claims.

And we released only our current offices in the settling defendants. On October 10th, 2018, there was a hearing in front of Judge Stern. I believe you were there, your Honor. And he issued a decision on October 29th which is at 2018 WL 5792151. And he approved the contract over objection.

And I'd like to quote from his decision. He stated that there was, quote, Widespread support of the proposed settling agreement from the plan's participants. And he was quoting Arlene Violet. He

quoted her saying, Excellent first step in attempting to secure additional funds to bolster the plan, unquote. Jeff Kasle, he quoted, He represents wholeheartedly and unequivocally his support for the PSA. And Chris Callaci, who is counsel for the union, UNAP, at the hospital, he quoted him as giving his quote, unwavering support, and noted that apart from the objections he heard from the defendants in the case, there were no other objections from any other participants or creditors.

So an order entered in the superior court on November 16th allowing us to go forward here. We filed a motion here on November 21st, 2018. And here's what we're asking for today before we get into the argument. We're asking only a preliminary order and only relating to those three defendants; CCB, old Roger Williams, old St. Joe's. We're asking -- and there's a proposed order in the file, it's document 63-2 -- it's asking for a finding that as to this partial settlement, the finding is within the range of possible final approval, within the range. That it's in good faith within the meaning of the new statute. That notices under CAFA [phonetic] must go out to potential class members and various AGs and that Wistow, Sheehan & Loveley, my firm, be appointed as preliminary class counsel, not as

final class counsel, and only for the settlement. And that the hearing be scheduled for full approval or objections to be heard against the settlement and objections to what then will be our applications for fees and objections.

I'm going to stop there and --

THE COURT: So I have a number of questions. I can save them for Mr. Sheehan if you want. But some of them are sort of general questions. I don't know if you want to try to answer them or not.

The first one is just a very basic question which is, do you agree that this is an ERISA pension plan?

MR. WISTOW: No, I don't agree, your Honor.

THE COURT: Did you plead it? You pled this case as an ERISA plan?

MR. WISTOW: Right. I pleaded in the alternative.

THE COURT: But aren't you bound by that pleading?

MR. WISTOW: No. In my memo, I cite cases that commend lawyers in situations like this for pleading in the alternative. And let me say, absolutely I pleaded it was an ERISA, without question, but I also pleaded in the second portion of the thing that it was not an

ERISA plan.

And indeed, the reason we brought the state court claim is it's denuded of the ERISA applications in the event your Honor chose to find that it was not an ERISA plan and refused to continue to have ancillary jurisdiction or supplemental jurisdiction as to the non-ERISA things.

THE COURT: Well, when do you have to make a choice on this?

MR. WISTOW: For a settlement like this, and Mr. Sheehan will address that, there are cases settled sometimes because it's unclear what the result can be. It's to avoid getting into the issue of is it ERISA or is it not? This Court has jurisdiction because of the pleading of ERISA. It doesn't mean that before it can approve it, it has to agree that it's ERISA. You could look down -- let's try it this way, your Honor.

If I pleaded that this was an ERISA case and it turned out not to be, as has happened in some of the cases we cite, a settlement is still binding because the Court has jurisdiction and doesn't have to go through the steps of deciding if it is, in fact, an ERISA case.

And by the way, the defendants have not answered the case. They have not even said that it's an ERISA

case in their answer. I hope that answers your question.

THE COURT: Well, it does, but it seems like there's just a lot of fancy footwork going on here, and it kind of bothers me a little bit; that is, you don't want to say it's really an ERISA plan, but you actually want me to make declaratory rulings about the application of state law that you say are appropriate or important to the settlement. And I feel like -- I feel a little bit like, you know, you want it all ways here.

MR. WISTOW: My cake and eat it.

THE COURT: You want it to be in federal court. You want it to be in state court. You want a state court receivership. You want the federal court to make a declaration as to the applicability of state law. And we haven't even -- the case, as you just pointed out, hasn't even been answered yet.

So, you know, I mean, I totally agree that -- and, you know, maybe this isn't working with the way you wanted to provide the argument -- I totally agree the parties have a right to settle their claims whenever they want to and that's fine. I don't want to be one to stand in the way of a settlement. But I'm a little concerned about being asked to put stamps of

approval of this settlement that get way ahead of the case when we don't even know if you're in the right court.

MR. WISTOW: We are in the right court if we plead ERISA. That's clear, that's what the cases say; you have jurisdiction. If you ultimately decide it's not ERISA, the cases say that doesn't vitiate settlements that have been entered into. The Court has jurisdiction.

My hesitancy in taking a firm position as to whether it's ERISA or not is ERISA is a question of both fact and law, the applicability in this situation, and really cannot be predicted in some circumstances until the completion of a trial. And to take the position until we know definitively whether or not it's ERISA means no case can be settled.

The reason -- I was not trying to have my cake and eat it. What I did was what the cases say is prudent to do. I'm not here to tell your Honor that this case is an ERISA case without any doubt whatever. I don't have the temerity to do that. I think it's a case that can be, in good faith, pleaded to be ERISA and ultimately may be proven. On the other hand, it might not be, and that's why we have the state court claims.

Your Honor can keep the state court claims if you wish under supplementary jurisdiction even if you decide it's not ERISA.

THE COURT: Well, let me ask you this: If there's at least a strong possibility that it's an ERISA claim and an ERISA plan, why wasn't the receivership sought in federal court instead versus state court? We have an argument here that the state court is without jurisdiction and shouldn't have appointed the receiver in that the receiver has no real legitimate authority.

Now, there's a whole side of that which I'll ask the other side about, which is, to some degree, I say so what; I could just appoint Mr. Del Sesto as the receiver in federal court and adopt everything that's gone on so far. And I think under my equitable jurisdiction if the receivership was in federal court, I have the authority to do that and I could move this right up to where it is now. So I'm not sure that as a practical matter that it's all that significant.

But they raised this argument, and it does seem to me to be a legitimate question. If it's an ERISA plan, why wouldn't it be a federal court receivership?

MR. WISTOW: The answer to that question, your Honor, is in the pleadings we submitted, and it's an

area that my brother understands better than I do, the role of ERISA. Let me say this -- and I do want him to speak about it because I don't think I can do justice to it.

What I will say is even in the motion to dismiss that was filed on December 24th by these defendants that are saying this, they never said boo about the inability to appoint the receiver. This came up for the first time in the objection. They even have pending in front of the state court motions which I've attached to my papers which they wish to be heard, their motions, for March 1st. That's Exhibit 2, I believe, to my objection to Prospect.

In addition to that, your Honor, the receiver has been in the state court at least six times that these people have been parties to asking for disbursements. They never, ever raised this. I'm not talking about waiver of jurisdiction. What I'm talking about is -- they've raised an interesting issue. There's not one case -- I've read the cases Mr. Sheehan briefed and his responses. I see myself getting into arguing this, and I'm really not competent to.

THE COURT: So maybe you want to turn it over to Mr. Sheehan.

MR. WISTOW: I think that is what I should do.

I do want to say one other thing about this.

One of the things that is especially troubling about this is your Honor knows by now that two lawyers and I from my office went to Washington to meet with the PBGC in, I believe it was, December with the former chief counsel of the PBG who is advising us where this was discussed. There's a declaration by that lawyer -- he's no longer with PBGC -- that every single pleading in this case, every one, and there's a supplemental declaration that I handed in this morning, including the declaration recently raised that the Court appointing Mr. Del Sesto, the superior court Judge Stern, had no possible jurisdiction.

All of that has been sent to PBGC and the way it's been categorized, and I quote from docket 101, page 28, the surreply you allowed, Concerted efforts by the administrator, meaning the receiver, meet with and dissuade the PBGC from discharging its statutory responsibilities do not make the PBGC less of a necessary party and undercut the administrator's attempt to categorize the PBGC's role as speculative.

Your Honor, this is a complete red herring and I'm hopeful -- I'm confident, I should say, that Mr. Sheehan can convince you. And with that, I'll subside.

THE COURT: Okay. Thank you.

MR. SHEEHAN: May I proceed, your Honor?

THE COURT: Yes.

MR. SHEEHAN: Thank you, your Honor. I have prepared points to address, and I really think it might make sense to pick up where Mr. Wistow left off in response to the Court's questions before I do that, with the Court's permission.

THE COURT: Yes. You know, let's be cognizant of time here. We started around 10:00. I was a little late on the bench. It's 10:45 now. So, you know, we don't have unlimited time. So why don't you do what you can do in about 45 minutes.

MR. SHEEHAN: All right. Thank you, your Honor.

The question was why was this filed in state court. The receiver didn't file this case, your Honor. The defendant, St. Joseph Health Services of Rhode Island, filed the case in state court and they contended in their petition that this was a church plan exempt from ERISA. Now, they also contended that at some point in the future it would become an ERISA plan, and they wanted a 40 percent cut in benefits before that happened.

Then the receiver was appointed. And the receiver realized that for the benefit of the plan participants, the better argument is that this was an

ERISA plan earlier but that, your Honor, is contrary to the way that this plan has been managed since 1965. For well over 40 years, your Honor, the plan has been operated as a church plan. Now, ERISA came in in 1973 so you'd have to do the math from that. So this was the predicament that the receiver found himself in.

Now, there was a question your Honor raised which is why ask the Court to make rulings on the state law joint tortfeasor statute if we're contending it's an ERISA plan? Your Honor, we're not asking you to determine that that statute applies. We're asking you merely to determine that if that statute applies, it's been satisfied.

THE COURT: Well, what's the difference?

MR. SHEEHAN: Oh, the difference, your Honor, is night and day because at some point later on in the case when rights of contribution have to be determined, the issue will arise, does the statute apply or not?

THE COURT: I mean, that's even worse. You're asking me to make -- you're not just asking me to interpret the statute, you're asking me to interpret it in advance of there being an actual case or controversy challenge in the statute. So you're asking me to give you some kind of a preemptory ruling.

MR. SHEEHAN: 100 percent not the case, your

Honor. A condition of the settlement the defendants insisted upon and the plaintiffs wanted also was that the settlement be approved as a good faith settlement factually. So there's no advisory opinion being sought from the Court. That's a linchpin of the settlement.

THE COURT: Well, I can rule that it's a good faith settlement and approve the settlement without making any ruling on the applicability of the state statute.

MR. SHEEHAN: 100 percent.

THE COURT: Okay. Well, I thought -- maybe I misunderstood what you said. I thought you said that you wanted me to rule that if the statute was applicable later on, that it was binding.

MR. SHEEHAN: Your Honor, that is poor phrasing on my part.

THE COURT: Or I didn't understand it. So let me just get this straight.

So you're saying to me that all that you are asking me to do is to approve the settlement as a good faith settlement and that with respect to the applicability of the joint tortfeasor statute and whether it applies and how it applies, that that's a matter to be left to another day with another court or this Court, however it plays out?

MR. SHEEHAN: 100 percent.

THE COURT: But that a finding of that sort in terms of how it applies to any future contribution action is not a contingency to the settlement.

MR. SHEEHAN: No, your Honor. The settlement anticipates and would be effective even if it were determined that the state statute doesn't apply. All the settlement deals with is the factual finding, and the issue of whether it applies or not will be litigated in some other context.

THE COURT: Okay. Thank you.

MR. SHEEHAN: Your Honor, the Prospect entities take the lead on the ERISA issues and make two arguments which are more non sequiturs than arguments. The first is the settlement should not be considered by the Court until the Court determines that the plan is governed by ERISA. And that has two parts. First part is plaintiffs and defendants agree that the plan is governed by ERISA. And second is PBGC should be a party to any settlement affecting an ERISA-governed plan.

Their second argument is federal courts have exclusive jurisdiction over disputes involving ERISA Title 1 violations and over fiduciary initiated lawsuits involving an ERISA plan. That's not actually

an argument, your Honor, that applies to this case, but I'm going to deal with it when we come to it.

The first point, that plaintiffs and the Prospect entities agree that the plan is an ERISA plan. The plaintiffs contend it's an ERISA plan, but it's against the factual background, your Honor, of the plan having been operated as an exempt church plan. So there is no clarity factually at this time that the plan is, indeed, an ERISA plan. We will have to prove that, your Honor, contrary to the way the plan has been operated, as I said, since 1973, over 35 years.

We also plead in the alternative state law claims that will entitle us to full relief. And there is a line of cases, your Honor, cited in our memorandum that says Rule 8 was designed exactly for this situation where there is any question about whether a plan is an ERISA plan.

Now, most importantly, it doesn't matter whether we agree. You cannot stipulate that a plan is governed by ERISA. That's a question of law, ultimately. You can't stipulate to the law. And we cited cases to that effect.

Most importantly, your Honor, is that uncertainty as to whether the plan is covered by ERISA does not preclude approval of the settlement. There

have been many church plan cases settled, your Honor, in the same procedural context we find ourselves in today where the defendants were contending it was exempt from ERISA, the plaintiffs were contending it was covered, and the case settled before there was any determination.

We cited four of them in our reply memo at page 48. There was another one, your Honor, two months ago in Texas -- actually Eastern District of Pennsylvania. And I'm just going to give copies to my brothers because it wasn't cited in the memorandum.

Your Honor, may I give a copy to the clerk?

THE COURT: Yes.

MR. SHEEHAN: And your Honor, I'm going to focus on the third finding of fact, which is on page 1, which states that at the time this action was being offered for settlement -- a class-action settlement -- there was a challenge to the plan as a nonexempt church plan, meaning, it had not been determined. And the Court approved the settlement.

Because, your Honor, courts approve settlements all the time when there is uncertainty as to the law. And as my brother pointed out, that uncertainty does not affect the Court's subject-matter jurisdiction. There's a great First Circuit case that talks about a

plaintiff alleging a federal claim and then thereafter the claim going up in smoke. But the Court still has federal question jurisdiction because that's predicated on the allegations in the complaint.

Now, right in *Miller* had the same point that -- at Section 12-374, the settlement hearing should not be turned into a hearing on the merits. Your Honor is well aware of that. I'm going to skip to it.

My adversary brothers do not address any of these cases even though they are in our reply memorandum, and they begged the Court's indulgence to submit a surreply memorandum. They don't cite any treatises or law reviews suggesting that there's any problem in settling a case when there's uncertainty as to whether the plan is governed by ERISA.

They make an argument, your Honor, that the issue of standing precludes the Court's approval of the settlement. Well, they claim that the plaintiffs, specifically the plan participants in particular, have no injury-in-fact. They don't -- their standing argument, though, your Honor, is expressly predicated on if the plan is governed by ERISA, plaintiffs will lack standing. They don't cite any cases that a court cannot approve a settlement because plaintiffs may lack

standing at a later time if it's determined that one of their claims is invalid.

We've cited many cases in which courts in your Honor's position have approved settlements because of the possibility that in the future it will be determined that the plaintiffs lack standing. And the reason, your Honor, that these determinations are in the future is that although standing is a prerequisite at all times in the case before the Court, the requirements of demonstrating standing are very, very liberal at the motion to dismiss or premotion to dismiss phase. At the summary judgment phase, much tighter. At trial, tighter still. So you may have standing premotion to dismiss and not have it in summary judgment.

There's the fundamental problem with their argument of basing standing on a possible future determination that the plan is governed by ERISA. And that fundamental problem is that standing is determined based upon the standard of proof applicable to the stage of the litigation when the issue is raised. And that's our case preanswer, even premotion to dismiss.

The question of standing is decided by assuming that all of the allegations in the complaint are true. That's the *Deepwater Horizon* case, your Honor, the BP

case in the Gulf of Mexico.

THE COURT: Let me cut through this because I really want to cut to what I think is the chase.

MR. SHEEHAN: Certainly.

THE COURT: And I think that what the non-settling defendants are saying, what it really comes down to, is, look, you have -- you're saying to me, you have to figure out whether ERISA applies here and you have to figure it out now because if this is an ERISA plan, if this case is governed by ERISA now, then everything that has happened up to this point has been without appropriate authority.

This shouldn't have been a state court receivership. The receiver wasn't appointed appropriately. The receiver didn't have the authority to enter into the settlement. Everything is undone.

And so what you're saying is, I think as a general principle correct, that parties can settle their disputes anywhere along the spectrum and if the legal issues that may be raised by the case may not ripen and never be decided, it doesn't preclude settlement. I think they would contend that this is a different situation because it goes to -- the question of whether ERISA governs goes to the heart of the authority of the receiver to do any of this.

Now, I raised with Mr. Wistow a practical solution to that which I'll ask them about which is, okay, even if all of that is true, why couldn't this just be made a federal receivership; I adopt everything that's happened, and then the receiver has the appropriate authority and moves forward with the settlement? That would seem to eliminate that problem.

And I'm going to ask them about it. You're welcome to comment on that. But that seems to be -- that just seems to me to be the core of the argument.

MR. SHEEHAN: All right, your Honor. My answer to that is twofold. The first is that they're wrong on the law that even if it were clear now that this was an ERISA plan, that the receiver lacks jurisdiction because he was appointed by a state court judge. They're wrong on the law. They don't cite a single case that stands for that proposition. There's the Princess Lida doctrine that holds that the first court to obtain jurisdiction over the race, in this case, the assets of the plan, has exclusive jurisdiction. And in fact, the state court, even if there are issues of federal law involving the race, the state court has exclusive jurisdiction.

Now, in this case that issue of exclusion

jurisdiction is not an issue because the state court has deferred to this Court, but what that establishes is that the receiver has authority. The state court could have retained this case. And, your Honor, there's a decision two months ago, December 18th of 2018 -- I'm sorry, it's some time ago actually, *Browning Corporation vs. Lee*. It's 624 F.Supp. 555, Northern District of Texas, which is very, very applicable here, your Honor. I'm going to give my brothers a copy, and if I may hand a copy up to the Court.

This case, your Honor, involves a state court appointed receiver over the assets of what were believed to be a church plan. And litigation was brought by the receiver in state court for breaches of fiduciary duty. And thereafter, the receiver applied to the federal court for a declaratory judgment that the plan was governed by ERISA.

And the court held that state courts have the same competence as federal courts to decide whether a plan is governed by ERISA. And because the state court proceeding was ready for trial, the federal court stayed -- actually declined jurisdiction, and the state court determined whether the plan is governed by ERISA.

So this whole notion, your Honor, that state

courts have no authority in the area of ERISA --

THE COURT: All right. That's a 1986 decision of a district judge in Texas which, no disrespect, but that's 30 years old. Not all that long after ERISA was passed.

Is that the only case you can find to say that?

MR. SHEEHAN: No, your Honor, but it's the only case in this particular niche of a church plan that may or may not be governed by ERISA. But I represent to your Honor, and I'm about to cite cases, that it is a fundamental cornerstone of our federalism, if I may say so, that state courts of general jurisdiction are competent to decide issues of federal law.

THE COURT: That's certainly true, I would never disagree with that, but in the area of ERISA, I'm unfamiliar with any cases in which ERISA questions are dealt with in state court.

MR. SHEEHAN: Well, your Honor --

THE COURT: It's one of those three or so areas where the Supreme Court has said the field is completely preempted by federal law. And I don't know, maybe it's just because of the practice, but these cases are virtually always handled in federal court.

Now, other than this case, I mean, I'm interested if you have other authority that says as a

principle, as you used the term, our federalism, if that principle has been used to say that, you know, state courts -- just as with constitutional questions, state courts are perfectly competent and capable and should be deciding ERISA questions just like federal court. I'd be interested in the cases that say that.

MR. SHEEHAN: We've cited your Honor to the *Dailey* case which is a Third Circuit case involving the NHL. And I don't have the cite in front of me, your Honor, but it's in the memo. And there was a prior pending action in Canada involving the pension plan. And the Third Circuit was asked to take jurisdiction because it was an ERISA case, and federal courts have exclusive jurisdiction over ERISA.

And the Third Circuit said that the Princess Lida doctrine absolutely forecloses that argument in the context of ERISA notwithstanding the strong federal -- strong congressional intent that ERISA be adjudicated in federal court. Princess Lida precluded the Third Circuit from deciding ERISA cases because a Canadian court had prior jurisdiction over the plan.

And the Princess Lida doctrine, your Honor, is fundamental. It was established to deal with the problem of state and federal courts exercising jurisdiction over the same race. And it said the first

court to have jurisdiction gets it. State court, gets it. Canadian court, gets it. That's it. That's the first point, your Honor, that they're wrong as a matter of law even if it were determined now that ERISA was applicable.

But more importantly, your Honor, the determination cannot be made now whether ERISA is applicable. And consequently --

THE COURT: Why not?

MR. SHEEHAN: Your Honor, should your Honor make the determination, we would have to have a trial. There are issues of fact. This was operated as an ERISA plan until it was put into receivership. And all of our claims, your Honor, arise, by the way, before the plan was put into receivership. If I may just get some water.

So there are issues of fact.

THE COURT: You could have a situation where -- I can't remember now. The complaint in this case is 150, 160 pages long, but it could be that the defendants end up admitting all the facts relating to this being an ERISA plan. There might not be a need for a trial. You pled certain facts in the complaint. They may admit those facts. Those facts are now established.

MR. SHEEHAN: But they haven't admitted anything.

THE COURT: I know they haven't answered yet.

MR. SHEEHAN: Let me rephrase my argument.

THE COURT: If they did, that would be established.

MR. SHEEHAN: Let me rephrase my answer. It could possibly not be determined until there's a trial. That's why it can't be determined now.

First of all, it can't be determined now obviously at this stage of the pleadings. Your Honor would have to deny the settlement. We'd have to have the motions to dismiss be decided. There would have to be discovery. There would be motions for summary judgment. We're talking a considerable period of time from now at a different stage of the litigation.

It cannot be decided now whether the plan is or is not governed by ERISA. And it's that stage that the settlement is being asked for court approval, and it is in that context that the Court must act. The Court cannot act because something may happen in the future that will divest the Court or the state court receiver of jurisdiction. The issue is whether there is a colorable claim now for jurisdiction. And there certainly is.

Your Honor, none of these church plan cases -- we cited four of them in our memo, there have been dozens that settled in precisely this context -- before there was any determination as to whether this plan was governed by ERISA. Now, my brother will say but those didn't involve state court appointed receivers, which is why I handed up the *Browning* case, your Honor, because that did.

THE COURT: Okay. Why don't you deal with the PBGC issue. I really -- I get it. I think I understand your argument. So get to that because we have these other issues as well.

MR. SHEEHAN: I will, your Honor. My brothers argue that if this is an ERISA plan, the PBGC has to be involved. Again, they're jumping the gun. At this stage of the proceeding, it cannot be determined that the plan is an ERISA plan. So that question about what may happen later is premature and not an obstacle to settlement, first.

Second point, let us say we stipulate to the facts and your Honor rules right now that the plan is governed by ERISA. There are insuperable obstacles to bringing the PBGC into this case. Rule 19(a)(1)(A) allows compulsory joinder where the court is unable to accord complete relief between the existing parties.

And that does not apply in any way, shape or form to the possibility that the PBGC may come in at some point.

If the Court denies our claims, the defendants get complete relief between us. And the fact that they may be exposed to other litigation under the established case law under 19(a)(1)(A) is irrelevant. That's (a)(1)(A).

(a)(1)(B) is if the party who has not yet been joined claims an interest in the subject matter of the action, then that party may be compelled to join and then there are two subsections to that under which that may happen. But the predicate is that the party has to claim an interest. And the PBGC has not claimed an interest. So Rule 19 prohibits compulsory joiner.

On top of that, your Honor, we have the *Heckler vs. Chaney* case which holds that an agency's exercise of its discretion not to commence an enforcement action is not judicially reviewable. What that means in this case, your Honor, is that this Court could not compel PBGC to take over the plan. And they only operate after a termination. A termination clearly would have to precede PBGC involvement. The PBGC guarantee is plan determination insurance. The statute is clear, that's the predicate, so the Court could not compel

them to terminate the plan.

And what the Court in *Heckler v. Chaney* analogized to was a court compelling a prosecutor to seek an indictment. Not judicially reviewable, cannot be done. And this issue came up in the *Paulson* case, your Honor, the Ninth Circuit where a district judge sua sponte directed the PBGC to be brought into the case. They were acting as the statutory trustee in a plan that had been terminated. The plan participants had sued for a breach of fiduciary duty. The judge thought, well, since the PBGC is the statutory trustee for the plan, they should be asserting claims against those fiduciaries and ordered that PBGC provide them to the case.

After four years of back and forth -- if you look at Pacer, it's mind boggling -- the district court reversed itself and said that PBGC's decision whether or not to sue these fiduciaries is a discretionary decision. And the Ninth Circuit said, no, no, no, we agree with the conclusion but not the reasoning. It's not discretionary. It's not judicially reviewable.

And my brothers have argued that this Court could conduct a de novo review of the PBGC's refusal to terminate a plan, which is categorically 100 percent false. Not only that, it's not an abuse of discretion

standard. It's not judicially reviewable. So PBGC is about as far from the issues in this case now as it could be.

THE COURT: Okay. Now, before you sit down, I want to come back to the ERISA question one more time because I want to make sure I understand where you stand, I guess.

So it seems to me that the way this could play out is I could approve the settlement preliminarily, moves forward, and maybe even approve it finally that the rest of the case moves forward. Eventually there's a summary judgment or a trial and there's a -- there could be a finding against the non-settling defendants. And then those defendants move at some point for -- are sued for contribution on the settling defendants, and that's when the issue is finally joined as to the enforceability of the settlement statute.

MR. SHEEHAN: That's precisely the plaintiffs' position.

THE COURT: And presumably, by that time, some finding will have been made about whether this is an ERISA plan or not because if we proceed all the way to trial in this court, then it's obviously an ERISA plan.

MR. SHEEHAN: Somebody has a judgment against them.

THE COURT: Can't stay on the fence all the way to trial.

MR. SHEEHAN: Exactly. I don't know if I agree with you describing us as being on the fence, but I get your Honor's point and I agree.

THE COURT: Finally that's decided; it's an ERISA plan.

MR. SHEEHAN: Right.

THE COURT: And there's an action for contribution. And either I or another judge or Judge Stern, whoever has it, has to then decide whether this prohibition on contribution applies. Defendants would say there's a very real possibility that at that point in time you're going to decide that this contribution statute is completely preempted by ERISA; it has no application.

Now, that's the point, right, that's the point. They're saying, look, everybody's better off if you decide it now because you're going to end up deciding this later and those settling defendants are going to say, well, you know, we thought we had this protection. And then I don't know what happens after that. Do they go -- let's say I find that the statute is preempted by ERISA, that there's no protection. Now, there's nothing left, there's no assets, there are no assets

left in the settling defendants.

So now what happens? Are these defendants going back after the pensioners? I mean, what happens?

MR. SHEEHAN: Your Honor, your scenario would involve the settling defendants incurring years of legal fees and the no assets problem would -- the ox would be gored, would be the ox of the plan participants. The defendants' rights to contribution are determined at the time they have a claim for contribution, and that cause of action does not arise until they have been held liable. And to preserve the status quo because of something that may happen in the future was addressed by Judge Selya involving the same statute in another context, the *Depco* context. And he pointed out that there are eight steps that have to take place before you get to the issue of whether the statute is constitutional. And it is premature to make any determinations of those steps in connection with a settlement. And he listed the eight steps.

Your Honor, that would be giving the defendants the benefit of pre-cause of action contribution preservation of assets. And the law is that you take what you get when your cause of action arises; you take what's there.

Now, the suggestion by the defendants, your

Honor, that the statute would be preempted by ERISA is addressed, and it would not be. There are three cases in the District of Massachusetts -- two in Mass and one in Puerto Rico --

THE COURT: But you're saying I shouldn't decide that now.

MR. SHEEHAN: But your Honor's scenario, and I want your Honor to be comfortable, that the law in the First Circuit, at least by the district court interpreting the First Circuit and the Supreme Court, is that ERISA does not preempt state law contribution rules.

The Second Circuit has gone the other way. Second Circuit has been heavily criticized for that. So that --

THE COURT: The bottom line is, your point is, it's premature and I shouldn't decide it now, correct? That's your position, isn't it?

MR. SHEEHAN: Right. And your Honor shouldn't be concerned about preserving assets for a claim that may arise in the future.

THE COURT: It's not that I'm concerned about it. I'm just saying --

MR. SHEEHAN: No, you raised the issue.

THE COURT: They're concerned about it and

they're saying, I think, that that's the scenario. And I get your point. You get what's there if and when there's anything there, if you win.

MR. SHEEHAN: Your Honor, the settling defendants, by the way, are bearing the risk that if the statute is blown out -- I'm sorry, your Honor. I've come down from 10,000 feet to be here today, and I am incredibly dehydrated. I'm going back to Denver tonight.

Your Honor, I just lost my train of thought.

THE COURT: It's okay because I think you made your points, and I want to give them a chance. So why don't you sit down and hydrate and you can respond after --

MR. SHEEHAN: It finally caught up with me, your Honor. Your Honor, I do want to hand up the affidavit from Mr. Cohen. And what it is is a supplementary affidavit that brings to the present the representation that PBGC has been provided with all the pleadings in this case so that the argument --

THE COURT: That's fine. I understand the point.

MR. WISTOW: Your Honor, please, before -- I just wanted to add --

THE COURT: This isn't a filibuster. You have

to give the other side a chance.

MR. McGOWAN: Mr. Sheehan has inspired me to bring my own water.

Good morning, your Honor. My name is John McGowan. I know -- I think I've been described a couple different ways today, but it's McGowan. May it please the Court.

I'm here to basically address Prospect entities' called ERISA-related issues. And I know that Mr. Wistow described them as kind of first order PBGC and then ERISA. I think it probably more logically is taken in reverse and talk about ERISA generally and then maybe in that context PBGC. I think primarily because if ERISA doesn't apply and this is not an ERISA plan, the PBGC has no role, you know, it kind of goes by the boards.

I think one of the basic takeaways from our position is that we do believe that the ERISA question is a threshold question on a lot of different fronts. I know that I've been practicing ERISA law since 1984 and, in my experience, this is the latest in a federal court proceeding that that threshold question has gotten kind of raised and much less disposed of, and I think for a couple reasons.

First, it goes to subject-matter jurisdiction.

I don't think there's an alternative claim that diversity exists here. Maybe there was another claim on some other federal statute, but I think that the whole premise on which this litigation was commenced was the idea that this Court had subject-matter jurisdiction because of ERISA. So that I think is a key determination.

And second, it goes to the question about preemption of state law. And an awful lot flows from that determination; i.e., if this is an ERISA plan and ERISA applies, this Court has subject-matter jurisdiction. If ERISA applies, then federal preemption applies in a lot of different contexts to a lot of different claims. So from my perspective and again from my experience, it typically is something that it's addressed right out of the gate.

And, you know, again, we do understand that we haven't answered. We have made, I think, abundantly clear in our motions practice that we do agree -- we do believe that this is an ERISA plan based certainly upon the allegations in the complaint and from all that we've seen, particularly if, again, is true in, I think, paragraph 80 of the first amended complaint, there is an assertion that following the sale of the two hospitals to our clients that the president of, I

think, St. Joseph's Hospital of Rhode Island and in-house counsel were basically put in charge of the plan.

And one of the linchpin arguments that we believe plaintiffs are making here in arguing that the church plan exemption does not apply is that the plan neither is controlled by a church or, for that matter, an entity the principle purpose of which is administering the plan. And, you know, having a couple of guys run it probably isn't a principal purpose entity.

So we think there's -- we understand, you know, there's a judicial finding that needs to be made and a critical one we believe, but --

THE COURT: Again, cut to the chase here. It seems like this is all premature; that your request for this finding at this stage, it's premature, it's not ripe. There's a settlement. The parties have a right to settle the cases. Cases settle here all the time where there may be questions of the merits of the claim. There may even be questions of jurisdiction.

So for example, an example that happens all the time is the case is either brought here or removed here that has a federal 1983 component to it, but it has also various state law causes of action. The 1983

component may not have any merit. It may be subject to a valid qualified immunity defense that would result in federal jurisdiction being stripped. But the parties settle the case.

Sometimes they even try the case and go forward. Early in the litigation we don't look behind the 1983 claim and try to figure out whether there's a valid qualified immunity defense to decide whether they should be here in federal court. If they want to settle, they settle and we don't get involved in that.

Why is this any different? I understand it's ERISA, but really in principle, why is it different than any other case where the parties have worked out a settlement relatively early in the litigation?

MR. McGOWAN: Well, first of all, your Honor, we are not suggesting in any way, shape or form that parties in raising ERISA claims can't settle them; i.e., we're not saying that you have to decide ERISA cases and figure out whether subject-matter jurisdiction exists before you can even consider a settlement. But I think what sets this particular case apart from a lot of those cases, I believe all the cases that were raised by our brethren in their reply, but also in I think -- cutting to the chase, this is not a complete settlement. This is a partial

settlement with some of the defendants with a case moving forward under ERISA or not under ERISA against a number of other defendants who remain in a case going forward. And I do believe that in all of the other cases they were complete settlements as to all parties and as to all issues.

And I understand that; i.e., parties can go outside the courtroom doors and make a deal and not bother the Court further and make a contract amongst themselves and go away. And even though ERISA, perhaps, is implicated or even if it's involved, they can certainly do that; nothing stops them.

But in this particular case, only some of the defendants are going away. The plaintiffs remain, and all the other defendants remain to sort it all out.

THE COURT: Happens all the time.

MR. McGOWAN: Well, but in this particular case in a situation where if ERISA doesn't apply, this Court has no subject-matter jurisdiction and where are we? And if ERISA does apply and under the scenario that your Honor posited to Mr. Sheehan, if ERISA does apply and, again, we submit and I think our papers reflect the fact that a state statute that specifically addresses pending ERISA litigation, you know, would be facially preempted. So, okay --

THE COURT: But that's a question for another day in another -- either within this case or in another case where your clients ultimately have a judgment against them and then need to seek contribution from the non-settling defendants. We're not there yet.

And you may be right if you bring that contribution claim that you can convince a judge that the contribution -- the joint tortfeasor statute that was passed is completely preempted by ERISA and has no effect, you may be able to prevail on that. But you're asking me to effectively make that call now when there's no case or controversy in front of me that would call on me to make that decision.

MR. McGOWAN: Well, I guess, your Honor, I think what we're saying is that we think that our interests are prejudiced by allowing it to move forward now before we get to that point. In an alternative scenario, if CCCB and the other settling defendants in this particular settlement were to be put in a bankruptcy proceeding and everybody could have a run of the assets, all of us would be -- if you're standing equally as to each other, none of us have liens, none of us have secured rights, we'd all be sharing pari passu with each other in terms of what they've got over there. But in allowing this partial settlement to move

forward and then pronouncing that, perhaps, we have very valid claims later after, frankly, the plaintiffs have been allowed to clean out the closet, leaves us prejudiced by that process. And we believe that that does a disservice certainly to our clients but, I mean, you know, we think it's inappropriate under these circumstances if, in fact, they aren't getting -- that is not the deal, that the deal is found to be completely different than what it is, again, the state statute doesn't apply but so what.

We're just -- you know, we've been prejudiced, our plan has been prejudiced --

THE COURT: Under your construction of how the world should operate here, how this case should proceed, you would effectively prevent any defendant from settling their claims with the plaintiffs unless all defendants settle or all defendants are always on the same -- you know, the same stage or on the same page. And that's really never the way litigation works. I mean, sometimes defendants all get on the same page, but very often they're not on the same page and they act and operate independently.

So, I mean, you say your clients are prejudiced, but the settling defendants are prejudiced if I don't approve this settlement in the sense that they want to

dispose of this matter and they want to be done with it. They don't want to incur any additional legal fees. They don't want to drain the assets. They don't want the litigation to go on for whatever reasons they have, but they don't want it to go on. They want to be done with it. And you would be standing in the way.

MR. McGOWAN: Well, I mean, in fairness, and we have not yet raised this issue in this litigation but, I mean, I do know that our clients have contractual indemnification claims, I mean, irrespective of the right to contribution or indemnification which, by the way, in the literature, the Second Circuit versus Ninth Circuit discussion, has always involved whether or not there's a right to contribution for indemnity as between breaching fiduciaries.

And in our particular case, our clients are non-fiduciary, non-parties in interest who are strangers to the plan so I'm not sure that even that broader discussion where it kind of goes to our question about whether we have noncontractual rights to contribution or indemnity. But the point is we have contractual rights to indemnity so that we could well, for that matter, hold the settling defendants in the case on the grounds by asserting cross-claims against them for indemnification based upon our contractual

rights, and they could be here spending money anyway. But, you know, that's a question for another day.

THE COURT: They may be judgment proof, right?

MR. McGOWAN: Yes. They could be judgment proof.

In terms of the ERISA issue, again, we understand that there's been no determination made, but we do believe that, in our view, this is an ERISA plan. And if it is an ERISA plan as we believe, this Court does have subject-matter jurisdiction that the receiver, in his capacity as the administrator of that plan, has fiduciary obligations. And we do believe that at least the settlement should be viewed with fresh eyes by this Court acknowledging, one, what the plan would gain but, more important, two, what the plan would give up in terms of the scope of the releases being provided.

THE COURT: But I'm not making any finding about the releases.

MR. McGOWAN: Well, but at some level that kind of is the point. I mean, the point is that the releases go beyond the corporate entities being released. It goes to all of the individuals who are current or former employees, officers, representatives, agents. And when you view this kind of a settlement

through ERISA eyes, then you're releasing not only the entities, but you're also releasing a number of parties who may well be fiduciaries and culpable fiduciaries in the circumstance. So is it a good deal or not?

Our point is that when the state court was looking at this, they weren't thinking of the scope of the releases being, perhaps, more encompassing than what maybe the court would consider, but the court over in state court is not familiar with the ERISA statute as it applies to fiduciaries post de facto and named and whether or not the releases were overinclusive.

So again, it's another reason why we believe that, you know, the Court should at least be looking at the settlement with fresh eyes to figure out whether or not it's reasonable and viewed through the prism of ERISA. Your Honor, you've mentioned a couple times when Mr. Sheehan --

THE COURT: Well, unpack that a little bit, Mr. McGowan. So I want to make sure I understand what you're saying.

MR. McGOWAN: Sure.

THE COURT: So you're really -- I think with that argument you're really saying not so much that ERISA preempts, but that my role in approving the settlement and finding that it's a good faith

settlement and it's in the interest of parties and so forth, that I should look at that with the kind of ERISA eyeglasses on, I suppose, looking at the -- not just the interest of the receiver and people that are represented by the receiver, but the question of whether the releases speak too broadly, whether there are people who might have assets that are being let off the hook here. Is that what you're saying?

MR. McGOWAN: That is in part because, I mean, bearing in mind that --

THE COURT: But isn't that an argument for the receiver to be concerned about, not for you to be concerned about?

MR. McGOWAN: Well, we are being pursued by the receiver in his capacity as the administrator of the plan for appropriate equitable relief under ERISA Section 502(a)(3). So to the extent that we're being pursued in equity, our kind of fundamental position is you have to exhaust other remedies against the breaching fiduciaries and to be able to accurately identify who those fiduciaries are before you can come against us in equity, even if you can get there.

And actually that kind of is another reason why we bring up the PBGC which is, I mean, we believe it's premature to again pursue and seek from our clients,

who are strangers to the plan, appropriate equitable relief without having exhausted all of the other avenues. And so to the extent that the plaintiffs kind of are hurdling forward and collecting what they can quickly from various sources in this particular case, the people who are the entities that sponsored and maintained the plan and chose not to fund it and neglected it after the sale of the hospitals in 2014 before turning it over to the receiver in 2017, that to quickly settle with them and then seek to pursue us in equity is that they haven't yet done their homework and that -- you know, not all of it, and we understand reasonable minds can differ but --

THE COURT: I'm just not sure I even get that argument. They are the masters of their complaint. They are the architects of their litigation strategy.

Who are you to tell them how they should litigate this and ultimately decide which parties to settle with, which assets to grab, which defendants to go to trial on? I mean, that's all litigation strategy. These settling defendants have a limited pot of money available; it's a dwindling set of assets. It seems perfectly legitimate to me that they make a decision to grab those assets while -- and preserve as much of that as they can, at the same time looking at

these other defendants and saying there are very deep pockets there, the assets aren't wasting. We're going to continue to litigate against this set of defendants, and maybe at some point we'll settle with them, maybe not. Maybe we'll go to trial.

I mean, that's just a litigation -- that's a strategic litigation decision that a plaintiff is perfectly entitled to make. I mean, you don't have any right to tell them what to do and how to do it.

MR. McGOWAN: No, and we're not purporting to. We're merely observing and arguing that our position is that we are at, if you will, the make whole end of this and, you know, we would be remised were we not to point out to the Court that there may be more opportunities for them to make whole before they even get to us. And that's why, you know, we are objecting to the fact that the settlement was hastily done over in state court.

THE COURT: They can't get any more out of these settling defendants than they're getting, can they?

MR. McGOWAN: But in exchange, they're releasing not only the settling defendants, but they are also releasing other parties, other non-parties, who could be pursued perhaps for breach of fiduciary duty for having been instrumental in running the plan into the ground.

Sp I guess what we're saying is that the settlement release, we believe, sweeps too broadly and there is a problem with that.

THE COURT: Well, but your answer or your way of -- your client's way of dealing with that is through contribution later on. Now, you've got a problem because they got this statute passed, but you can make your argument later that that statute is preempted and has no effect. And you'll have an opportunity to seek contribution not just from the entities, but maybe from those people that you're thinking had more assets that had been released as a part of this settlement. That release doesn't have any impact on your clients.

MR. McGOWAN: Another thing that is a little bothersome about this and the manner in which the settlement was forged is the fact that we believe that one of the other missing parties in this case is potentially the Department of Labor. We certainly are aware that if, in fact, this is an ERISA case, and I think an early determination of that would kind of set the table for the DOL to make a determination as to whether or not to get involved.

THE COURT: I guess I just don't understand that whole argument. It seems to me that the PBGC's decision to take over a plan is driven by their statute

and the regulations that they operate by. And that's an independent decision that it makes. It doesn't seem like that is within my authority to tell a federal agency that it should engage its authority on this pension plan at this time if it is decided that the plan is not ready for it, I guess.

MR. McGOWAN: Well, let me address that case -- that matter, your Honor, and then go back to my point about the Department of Labor, a different federal agency.

THE COURT: Okay. Go ahead.

MR. McGOWAN: No, I was talking about the Department of Labor.

THE COURT: All right.

MR. McGOWAN: But on the subject of the PBGC. We do agree that the statute says what the statute says and that if the plan is, in fact, insolvent, that the PBGC has an obligation to act and that the phrasing in the plaintiffs' brief that it shall act under certain circumstances, it may act in others, it's an accurate statement of the statute.

But our point is this: When we started down this road, the plan was characterized as insolvent in the complaint. It has -- the story has changed in the first amended complaint. Now it's insolvent, with

quotes, and the idea that maybe at some point in the future it will be unable to pay benefits when due but not necessarily can't pay benefits when due right now. There was a shifting in the alleged facts between the complaint and the first amended complaint.

But that being what it is, we have a situation where the plan is being maintained, if you will, by the administrator, a court-appointed receiver, and sponsored by three nonoperating entities or at least a couple of them, CCCB and such. And as your Honor pointed out, were the settlement to be approved, they would be denuded potentially of all of their assets. That fact pattern that there is a sponsor that not only isn't putting money into the plan but can't put money into the plan because there is no money and perhaps is even in kind of the advanced stages of the liquidation process, really puts the PBGC in a situation where it has no choice but to act.

We understand that the statute says that PBGC has the discretion, but there's four factors there. One is, has it met the minimum contribution requirements? That's been going on for apparently several years; since 2010 I think is what's been alleged in the first amended complaint. That it will not -- at least will not be able to pay all benefits

when due so it has that kind of future insolvency which is another of the predicate acts. And a third one which is the one that PBGC often moves on which is that the long-term implications of allowing the plan to continue put the PBGC in a position to want to act now.

And when the PBGC has a situation where basically a plan has all but been abandoned because the plaintiff sponsor is in liquidation, then the PBGC invariably steps in. I guess my point is, the trajectory for this plan and the trajectory for the plan sponsors is that the plan sponsors will be gone and then the PBGC has no choice but to step in because it doesn't leave plans orphaned and running indefinitely until they run out of funds.

I mean, that's what they certainly did in the *Sears Holding* court case. It's in bankruptcy. They decided they needed to step in because someone needs to act and take over the plan. They just did it again the other day in a case involving -- it's called *PBGC vs. Dimensional Lettering, Inc.*, over in the Eastern District of New York. And they filed that cause of action on the 6th of this month.

So the point is, it's a doomed plan at some level. The PBGC ultimately has to act. And the broader point that we were making about standing is the

fact that if the PBGC comes in, and we believe it's inevitable, and we acknowledge that with the discretionary sections of the statute your Honor could enforce it to, which I do think probably is good law, that eventually they will and when they do, that to the extent that the participants who are covered by the plan and the plan's subject to ERISA and the PBGC steps in and guarantees the payment of benefits, that actually the PBGC guaranty will be sufficient to completely make whole those individuals; i.e., there is no 40 percent cut in there for them. The PBGC guaranties will make them a hundred percent whole. And there may be a handful of participants. We don't have access to all of the plan records to try to make that determination. But the point is there may be a few participants in there if the benefit levels are beyond the PBGC guaranties, can't tell you that for a fact, but the point is only those people would be, if you will, left injured or having an injury in fact that would be beyond what even the PBGC could protect them from.

But it's a much different dynamic, it's a much smaller population, a fraction of the 2700 that are covered by the plan at this point in time.

THE COURT: Well, what law is there that says

that the PBGC must step in in front of other entities that may have liability to a plan and cure the problem before those entities are made to pay whatever they're responsible for because of their wrongful conduct?

MR. McGOWAN: Let me unpack that, your Honor. First of all, we think there is nothing that requires the PBGC to protect a breaching fiduciary who is liable to make good losses that breaching fiduciaries caused the plan. We think that, for example, the administrator's Section 502(a)(2) count, I think it's the second count in the amended complaint, again, these settling defendants and possibly others who are not even named as parties, there is no reason why the PBGC would have to step in to protect them.

Our point goes to the fact that three of the four ERISA claims -- actually, two of the three ERISA claims, one is just the declaratory judgment claim which is, I think, certainty Count Four, but certainly one and three are predicated if you're seeking appropriate equitable relief under ERISA Section 502(a)(3) and that in doing so, in seeking, again, equity to, if you will, make whole these participants, our point is in those circumstances perhaps the PBGC with regard to a plan that is on the precipice of insolvency or is in an orphaned position where, again,

PBGC's involvement is inevitable, we would submit, that the PBGC's involvement would then determine how much and which plan-covered participants might be left short and perhaps entitled to some sort of equitable relief from somebody. But that we view making that determination without making a determination of what the guaranteed benefits for those individuals would be would be jumping the gun. And that's why in our papers in our surreply we pointed out that the passage taken from the *DeWolff* case, *LaRue vs. DeWolff*, when you read it in its entire context from that case where the Supreme Court in that famous 401k plan case talked and compared and contrasted the defined contribution claim versus the defined benefit claim, talked about in a defined benefit plan claim that a participant covered by the plan wouldn't have an injury in fact if, in fact, their benefits were fully guaranteed by PBGC because they couldn't be injured.

I mean, right now we are at a stage in this process where there's been a lot of talk, frankly, picked off by the purported settling defendants about 40 percent cuts to benefits. And we are a long way from having that happen, your Honor, because if, in fact, the PBGC did step in and guaranteed benefits because it is found to be an ERISA plan, there would be

no 40 percent cut for anybody who is fully protected by the PBGC guarantee. They'd have no beef with anybody.

THE COURT: But they can come in at the other end too.

MR. McGOWAN: I'm sorry, your Honor?

THE COURT: PBGC could come in after this settlement after whatever transpires with the non-settling defendants.

MR. McGOWAN: They could come in after.

THE COURT: Tell me what you wanted to tell me about the Department of Labor.

MR. McGOWAN: Oh, I'm sorry, your Honor. Thank you.

The Department of Labor is a very big actor in the enforcement of ERISA rights and remedies. They're very involved in bringing their own causes of action. In many of the cases we've described to the Court, the DOL has brought those actions and sought a federal court-appointed receiver or an independent fiduciary. In fact, I think they just did so the other day in a case involving a defective multiple employer welfare arrangement. And that was *Acosta vs. Riverstone Capital* which they brought an injunction and got an appointment of a receiver the first of this month out in the Central District of California.

My broader point being, the Department of Labor routinely polices the rights of participants and beneficiaries in ERISA-covered plans and could, in fact, carry the laboring oar if, in fact, this plan were found to be subject to ERISA.

THE COURT: If that happened, what would be -- they would be petitioning this Court for the appointment of a receiver, right?

MR. McGOWAN: Possibly. Or for that matter confirming the appointment of Mr. Del Sesto. And I understand that.

THE COURT: So why couldn't I -- it comes back to a question I asked earlier on. If there was any question of the authority of Mr. Del Sesto as a state court-appointed receiver, why couldn't I just appoint him independently and adopt everything that's transpired to date or possibly appoint him jointly with Judge Stern in the state court? What would prevent me from making this a joint appointment of the two courts and that way, to the extent that ERISA is implicated or it should be an ERISA receivership, then we're covered?

MR. McGOWAN: We would be covered, but it would have implications for all that has gone on before. I mean --

THE COURT: I could simply adopt everything

that's happened before.

MR. McGOWAN: Without making an independent finding of whether or not what's gone on before is appropriate under ERISA?

THE COURT: No. I'm not saying I would do it without making an independent finding, but I've followed this pretty closely. I've consulted closely with Judge Stern throughout. I attended the hearing. I've read his decisions. I'm pretty up to speed. It's not like this has gone on, you know, without me paying attention to what's happening.

MR. McGOWAN: Understood, your Honor.

THE COURT: So, yes, I would make my independent evaluation, but assuming I did that and concluded that everything that has happened before I would endorse, then I don't think there's anything that would prevent me from doing that.

Do you agree?

MR. McGOWAN: As a practical matter, your Honor, I would never disagree with a federal court judge who believes he has the authority to do something. I would certainly not stand in the way.

THE COURT: Well, I don't think that's -- it's a legitimate question. I'm not trying to bully you into it. I'm really asking you the question.

It seems to me that my equitable jurisdiction with receiverships is quite broad and it's an honest question. I do think I have the authority to do that if it were -- I'm not saying I'm going to do it. I just think that it is a possibility.

Let me shift gears and ask you a different question.

MR. McGOWAN: Sure.

THE COURT: Because if your clients felt so strongly that this should be in federal court, receiverships are removable. Why didn't you remove this case?

MR. McGOWAN: Well, I think when the state receivership proceeding was commenced, and I will let my colleague, Mr. Halperin, perhaps deal with that in more depth, but my understanding is when this receivership proceeding was commenced in 2017, our clients were not on the horizon. Our clients were strangers to the plan. Our clients weren't involved in it. I believe that in at least a couple of the instances when our clients have attempted to step forward in the state court proceedings, it was ruled that they had no standing.

So I mean, they haven't exactly been -- had an opportunity to participate actively in the receivership

proceedings. I think they've been actually shown the door. But more important, there was nothing in the state receivership proceeding to suggest that state or federal court actions seeking to rope our clients in, irrespective of two hospitals they bought in 2014 in a receivership proceeding that was commenced three years later involving the plan, there was no belief on our client's part that they were part of any of that. Only later when the lawsuits were filed naming them as codefendants, were they apprised of that. So they had no reason to believe that they had an obligation to timely object thinking that the train was headed in their direction.

THE COURT: Okay.

MR. McGOWAN: And again, Mr. Halperin can expand upon that. A couple of final points, your Honor. I know that Mr. Sheehan had offered up this *Browning Corporation vs. Lee*. This is the one that's 30 years old or actually 32 or 33 years old.

THE COURT: Right.

MR. McGOWAN: An observation. You'll notice in our surreply we point out that with this being a retirement plan, if you will, there's a pretty pure application of ERISA's preemption provision and that there is a host of cases that -- where it gets a little

murkier. And that's because they implicate ERISA's savings clause, which is ERISA Section 514(b)(2) where the business of insurance and securities and banking are saved to state regulation. And that there's a line of cases typically involving health insurance where those issues crop up invariably.

This is one of those cases from 1986. It involves -- while certainly a church wasn't involved or a series of churches wasn't involved, this involves the organization, sale and marketing of health insurance across unrelated entities. And that's why if you look at the last couple of pages of that case where it goes, "The Court further finds it's in the best interest of all concerned that this court decline jurisdiction of this matter and permit the 200th Judicial District Court in Travis County, Texas, to adjudicate plaintiffs' claims. First, plaintiffs claim that the MBT is an employee benefit plan within the meaning of ERISA should have been raised as a defense in the pending state court proceeding." That case was filed over six-and-one-half years ago -- six-and-one-half months, I'm sorry, after the consent judgment, an order appointing permanent receiver was filed in the previous state court proceeding. And after the United States Department of Labor concluded that the MTB did not

constitute an employee benefit plan under ERISA.

The point is that the federal regulators concluded that that trust, which was to create and sell health insurance, was not itself an ERISA plan. So when all that flowed from that was it was over in state court and then the defendants tried to bring the federal courts back into it, the federal court said no. The federal regulators have concluded that there's no ERISA plan to be found there. This really is a state law matter. So I don't think it quite supports the point for which Mr. Sheehan advances the case.

And in the other case that he handed up which was *Snyder vs. Holy Redeemer Health System*, I note -- or at least from what I'm reading here, and I only had the opportunity to read it today, this looks like a complete settlement. It goes to my earlier point about the thing that sets this case apart from these other cases is a complete resolution of all claims against all parties, we understand. Certainly you can settle those where the subject-matter jurisdiction of the Court hasn't been conclusively determined or ERISA's reach hasn't been conclusively found.

But when you have a partial settlement of a case and the case seems to move forward, again, predicated on the existence of an ERISA regulated benefit plan,

that's another matter entirely.

THE COURT: All right. Let's go off the record for a moment.

(Off-the-record discussion.)

(Recess taken.)

THE COURT: All right. Mr. Sheehan, you can make your two points.

MR. SHEEHAN: Just reaching the podium now, your Honor. Point number one, your Honor, is that this whole issue about an injury because of the settlement statute is a red herring and this is the reason why, all of the defendant assets are going to the settlement and they are going to get a credit for every penny that's paid. And they benefit by having the settlement now as opposed to those assets being frittered away in litigation expenses and asserting a contribution claim later. If the statute is determined to be unconstitutional and they want to sue directors or officers for pro rata fault, they can. It's a nonissue, your Honor.

Second, on the Department of Labor, that's a whole new argument but, in fact, the declaration of Jeffrey Cohen points out the Department of Labor has been given notice of this suit in every pleading in the case. And the Rule 19 applies to the Department of

Labor just as it applies to PBGC.

And Rule 19 is the rule. There's no limbo state where the Court stops doing things deciding settlements because someone is out there who might be interested who's not coming in. They can't be brought in. They're not here. And the settlement has to go forward.

THE COURT: All right. Thank you.

Mr. Halperin.

MR. HALPERIN: Your Honor, we're switching gears now off of ERISA. I will be as brief as I can within the 15 minutes.

Your Honor, because I've been involved with this more so than Mr. McGowan, I want to just give you the background that perhaps was not provided that's relevant to where we are here today.

The petition that was filed, as my brother indicated for receivership, was filed by the St. Joseph Health Services of Rhode Island, Inc., which was one of the employer entities. And when they filed that petition, they alleged that the plan was not at that time subject to ERISA. My client, the Prospect entities, were nowhere to be found at that point. They were only the subject of a discovery subpoena. They certainly had no reason to even seek to remove it.

Although, I do not believe that they would have had any sort of standing to do so even if they wanted to do so.

Ultimately, Judge Stern did rule that Prospect entities had no standing to even complain about the settlement. I don't think that was viable. However, I fully support and would ask the Court to appoint Mr. Del Sesto as the receiver and have the ancillary receivership happening simultaneously. That has certainly happened before, and I think that would be very helpful and appropriate. And as this case moves forward, it would give the Prospect entities and other parties the opportunity to come before this Court with what might be solutions to this problem or different directions and ask that the receiver be instructed to do certain things; for example, the receiver could decide -- the Court could decide to instruct the receiver to terminate the plan because it should be terminated. At which point that would accelerate the PBGC's entrance into this case. Something to be considered at a later time, but without that ancillary receivership, that may not be before this Court.

THE COURT: Would you support that as a joint appointment?

MR. HALPERIN: Honestly, I believe that the state court has really no reason to be involved in this

on a go-forward basis, and I would -- I'm sure you could discuss that with Judge Stern, but I don't see why it would take two courts to adjudicate anything going forward. Once this phase of the case is over, we're into a different phase.

But if there's any reason for the state court to want to retain that jurisdiction, I certainly would not object to that.

THE COURT: Well, it might be just because it isn't clear yet what kind of a receivership it is, and it could be a state court receivership, it could be an ERISA receivership. And that issue hasn't been fully resolved yet.

MR. HALPERIN: I would agree to that. To that point, it makes sense to have both courts involved until that determination has been made.

On that one point, I have to say that when a plaintiff makes a statement in a complaint, it would seem to be a judicial admission of some kind that this plan is subject to ERISA so it's hard for me to imagine what the plaintiff is going to litigate on the issue of whether it's subject to ERISA. We're going to admit it; we've already said so. So it seems to me that issue has been decided unless the Court wants to make an independent ruling contrary to what the parties are

alleging in their papers.

So I'm not sure why there's all this controversy about it when it was alleged in their papers. Yes, they went in another direction, but that does not make sense to me.

An interesting point in the original petition for the receivership, which I noticed in preparing for this, is that it was stated right in the petition that was filed by St. Joseph Health Services of Rhode Island that the Prospect entities had no role in evaluating this plan or its funding level, which is sort of a gratuitous but interesting point that they made in filing this petition. It was only the investigation that went forward that yielded all these new claims.

It's been three years since that sale, and a lot has happened in those three years that we know nothing about. And I think the point that my brother was making as to the settlement is that the settlement, if approved by this Court, could be construed as the Court approving, blessing and essentially stating that all the provisions in the settlement including the releases have now been authorized by the Court. So to the extent the Court does approve this, we'd ask that the Court navigate to preserve the rights based on the things that the Court has said here today.

THE COURT: Well, there are statements in that settlement agreement, for example, that, you know, the settlement parties were -- I may not get this right; it's been a long time since I looked at it. The settling parties were less at fault than these other parties and things like that. I mean, I'm not going to endorse any of those statements if I approve the settlement. I mean, that has to be absolutely clear, as well as not endorsing or making any finding with respect to the enforceability of this joint tortfeasor statute.

MR. HALPERIN: And along those lines, the other points that I wanted to make are, the Court needs to be aware that the authority that's being granted by the settling defendants CCCB to the receiver is to control the actions of CCCB which is the 15 percent member of the Prospect CharterCARE LLC entity that controls these hospitals. And that necessarily implicates the state Hospital Conversion Act.

There is very clear language in the Hospital Conversion Act that when there is a change of voting control that you have to go before the Department of Health. And I can -- the language, we've cited it in our brief, but it's kind of cumbersome language, but if you take out all the inapplicable language that's in

the Act, this is what it says: Conversion means any transfer by a person or persons of authority in a hospital which results in a change of control of 20 percent or greater of the voting rights of the hospital, pursuant to which by virtue of such transfer a person, together with all persons affiliated, holds their own to the abrogate 20 percent or greater of the voting rights of the hospital.

What we have here is an entity in which the CCCB settling defendant controls 50 percent of the board seats of the hospital. That was the arrangement that was made. And now we could have the receiver essentially controlling the actions of CCCB, arguably changing those board members and doing so in a manner that is designed to benefit the receivership estate which, frankly, could result in a breach of fiduciary duty by some of those directors who could be appointed.

This is a concern that could be easily navigated around in the settlement in that the Court should require the receiver, and certainly if the receiver becomes part of the federal court receivership, that would be easily done. But even as a condition of the settlement, the receiver should be required to comply with any and all necessary laws and regulations that govern the control of the hospital and the Hospital

Conversion Act. That, by the way, is already a provision that is in the transfer section of the LLC agreement which leads me to my next point.

THE COURT: Just before you get to that, would you just -- I want to make sure I understand this ownership transfer clearly so describe that to me again.

MR. HALPERIN: Sure. There's two issues. One is ownership, but the other one is voting control and they are distinct.

THE COURT: Right.

MR. HALPERIN: So we don't have a reason to believe that the ownership interest will necessarily be transferred. It might, but more likely they will simply exercise the put rather than receive an actual transfer. So I'm focusing on the voting control.

THE COURT: Right.

MR. HALPERIN: And that's what I think the Hospital Conversion Act issue is. They control 50 percent of the board of directors of the Prospect CharterCARE LLC entity pursuant to the operating agreement for the hospital.

THE COURT: But back it up. With the put, describe to me again how that works.

MR. HALPERIN: Okay. It's before you even get

to the put. There are provisions in the agreement that allow the receiver to direct the conduct. So paragraph 17 of the settlement agreement has the CCCB entity holding in trust their interest for the benefit of the receiver. That I have no problem with from a voting control standpoint.

But paragraph 19 has PBGC required to comply with all reasonable requests of the receiver to maximize the value of the CCCB hospital interest. Paragraph 24 has the settling defendants agreeing to cooperate with and follow the request of the receiver. It's very broad control that they have the right to exercise once the Court unleashes that, and I'm very concerned that they're going to exercise that in a way that is detrimental to the operating hospital.

And the interests of the receiver are clearly adverse to the interests of the hospital entity operating. And I just want the Court to be aware of that concern that the receiver not taking action, it's going to either interfere with the operation of the hospital or risk the licensing of the hospital by violation of the licensing statute or the Hospital Conversion Act.

THE COURT: Okay.

MR. HALPERIN: On the LLC agreement side,

there's a breach right now of the agreement between CCCB and the Prospect CharterCARE LLC entity and the other 85 percent member Prospect East. The granting of that security interest is already in breach.

Now, there is a position that they're taking that it's not a breach because there's an exception in the LLC agreement that allows them to take that interest. And they are pointing to a section that's in the LLC agreement called Section 13.2. There's no question 13.1 is an outright prohibition against any hypothecation or transfer of their interest. 13.2 has some exceptions. However, where they're wrong and where we disagree is in 13.1 it says if there's a transfer otherwise permitted by this article, which would be 13.2, then a member may sell their interest only if certain conditions are satisfied.

And one of the those conditions is there needs to be an opinion of counsel satisfactory to the manager covering federal and state securities, healthcare and tax laws and other aspects of the proposed transfers the manager may reasonably request. In other words, if something is going to happen that's going to impact the interest held by CCCB, that needs to be done in accordance with all rules, regulations that govern the ownership of an interest in this hospital. And that is

just in there for that very reason.

So again, I think the Court can navigate around this by just putting some conditions or some constraints on what the receiver can do going forward once the settlement is approved. And that's really what we're asking the Court to do. The Prospect entities are not -- even though it may be hard to tell from all the argument here today, but the Prospect entities would like to see the monies that are in the hands of these settling defendants go into this plan, but we want to see it done in a way that doesn't prejudice our rights either under the Hospital Conversion Act or the LLC agreement or under this statute that may or may not apply in the future.

The provisions your Honor mentioned about that the non-settling defendants have a greater fault or that the value is $125 million, I'm not sure why that's in that agreement, but it seemed like it was some effort to create some collusion because it's clearly not factually correct. It's not even -- it doesn't even make any sense that the parties who ran the plan for all those years could have less fault than a party who had nothing to do with it. They even acknowledged it in their petition that we had nothing to do with the valuation of the plan or handling of the plan.

Certainly we couldn't have; we weren't there until 2014.

So it sort of on its face looked collusive and that's why we brought it up in light of the statute that talks about collusion. But again, easily navigated around if the Court approves the settlement.

THE COURT: So can I navigate around these things without making this a federal receivership just by crafting the order approving in a way that essentially protects against these various things which you raised or does it actually require me to be in a position of overseeing it as a receiver?

MR. HALPERIN: I would greatly prefer because of the allegation this is an ERISA case, that this Court oversee and direct the receiver on issues that are going to come up that relate to ERISA, and that's where this is all heading but, aside from that, I'm concerned that the settlement agreement has -- once the Court approves this particular settlement agreement, it has provisions that we then have to go litigate whether or not the Court essentially blessed the release.

And there's specific language in the settlement agreement -- rather, in the release that references that special act. So what happens if the Court approves this? Does that mean that the parties haven't

actually gotten the settlement agreement they thought they were getting or is the Court approving a slightly modified version that the parties need to step forward and say we agree to that change that this special act is not going to be applicable because it's written right into the release.

THE COURT: I'm making it clear right now that whatever I do, I'm not going to rule on the applicability of this act. I mean, that's for another time, me or another judge, who will rule on that. And I think I made that clear with my questions, but in case I didn't, that's where I stand on it.

So any order of approval would explicitly disclaim any rulings with respect to the special act.

MR. HALPERIN: I think that's appropriate and I think that would work, but I would still encourage the Court to make this a joint receivership.

THE COURT: I could see merit in doing that. I'm just trying to think through all the scenarios, and some of the things you suggested, frankly, most of the things you suggested sound more like state law kinds of concerns, you know, the compliance with the Hospital Conversion Act and so forth.

MR. HALPERIN: It goes to the future direction of the receiver which is why -- the Court would

probably allow us to be heard if the receiver was taking an action that was going to jeopardize the hospital. And we would like that to be a possibility to come into this Court since the Court is going to be much more familiar with all the proceedings going forward.

THE COURT: All right. Thank you.

MR. HALPERIN: Thank you.

MR. McGOWAN: Your Honor, if I might. My understanding is that the Court's heard all the ERISA-related issues.

THE COURT: Correct.

MR. McGOWAN: And if that being the case, I was wondering if I could be excused to try to beat the weather out of town?

THE COURT: Sure. Wherever you're getting out. You may.

MR. McGOWAN: Thank you, your Honor.

THE COURT: Mr. Wistow, I'm going to hear from the Diocesan defendant first and then you.

MR. KESSIMIAN: Good afternoon, your Honor. Paul Kessimian for the Diocesan defendants. I'd like to start off in terms of I think the remarkable difference between where we are now and where the motions set us up. So the motions sought relief under

the Rhode Island special statute. It sought approval under that statute which, as we know, has implications for contribution rights.

To the extent that the plaintiffs are seeking preliminary approval of the settlement without seeking any finding, that statute either applies or that the -- this is the key part, Judge: It's not just about that, it's about the scope of the release in the settlement agreement. So we have the issue of the statute and how that works when a case is settled under Rhode Island law which raises the ERISA issues. We also have a settlement agreement that purports to include a release that releases the directors and officers.

And we raised in our brief, and I'll have to rest on my papers given the time I have, your Honor, but we raised in our brief that there's a bunch of information we don't have on this record. Among them, did they look into the assets of the remaining defendants? Have they looked at the assets of the agents, directors and officers who may not be parties to the agreement but are being released?

And what we don't want to have happen at this juncture is to have any preliminary settlement approval affect the defendants' rights in contribution or other

rights against the settling defendants as well as those directors and officers. And if that's carved out and there's no potential preclusive effect on us, that goes a long way, but it's different than what they asked for in the motion. I just wanted to point that out.

And I did want to also point out the scope of release issue as separate and distinct from the Rhode Island special statute. And I think that needs to be addressed. I also wanted to point out, your Honor, that an issue was raised about the scope of adopting findings in state court. And I'll just briefly say on that, it's important to note that at least the Diocesan defendants weren't parties to that receivership. We were subpoenaed. We produced documents. But the receiver has argued, and we certainly agree, that we are a party to that proceeding. We were not parties to that proceeding. We didn't file objections to the settlement in that proceeding.

Our position has been that since the receiver has brought suit in federal court, has elected that option and we are parties in that proceeding, the place and time to contest issues like that are in this court and only this court with respect to us.

It's also important to note when the settlement was approved by the state court, your Honor, which was

referenced earlier, I did want to note that the standard of review is different than under 23(e) and good-faith certification that is before this Court. My recollection from that decision is Judge Stern specifically identifies a bankruptcy analog approval process which grants the receiver basically an abuse of discretion standard. So when the Court is reviewing the settlement in state court, it asks and grants deference to the receiver.

In this case, the receiver is a litigant. The receiver is not entitled to deference in terms of the reasonableness and good faith of this purported putative settlement. And we have raised in our brief questions that go to the very heart of whether this Court should approve this settlement as either meeting the standards of good faith or, more importantly, 23(e)'s requirement that it be adequate, fair and reasonable.

And part of that, your Honor, stretches to how much of these funds that are going in. And I did want to start off, your Honor, and agree with Mr. Halperin. We don't object, and we said in our brief, we don't object to the monies being transferred. We're just concerned about all these ancillary facts that the plaintiffs' motion may have. And one of the issues

that was raised that we saw was the release of these directors and officers who may be fiduciaries under ERISA law.

We also saw the liquid sums of these defendants. It appeared to us, and I can't go through it now given the time but we briefed it, your Honor, that it looks to us a large part of these sums were destined for the plan absent litigation. And there is no tick tock in any declaration that explains when the settlement negotiations began, whether the settling defendants offered to settle before suit commenced and, as your Honor knows, there's a big difference in the attorneys' fees.

Now, I'm not contesting the fees right now. What I'm saying is that question filters into the analysis.

THE COURT: But doesn't that argument really come up when the petition --

MR. KESSIMIAN: Yes, it absolutely does. What I'm trying to argue is it would also come up in any certification you would make that the settlement agreement was reached in good faith or is adequate, fair and reasonable because we don't know what else they gave up for that. And we briefed that the monies looked to be predestined for the plan anyway.

We also -- I will note, there's no description as to when the settlement negotiations really began, what the issues were and there are many cases under 23(e) and for good faith certifications where courts ask for that. So we're saying, you don't have it; it's not in the record before you. And we called it out in our opposition paper and said could you explain this. We got no response. We got no response about whether the money was predestined to the plan previous to litigation, and we laid out why we thought it was.

I'll also point out, we just found this recently on the receiver's website, that on a June 5th letter, I have a copy, to the Speaker of the House, the Senate President, the House Majority Leader that on June 5th -- this is before suit was filed in this case -- that they are writing a settlement statute asking to be enacted. And it says, "You should know that we already have parties who have expressed a willingness to settle and avoid even the filing of a complaint because we can not entertain those discussions until this legislation is in place.

So I think it's a very important question to find out when those settlement negotiations began and was this money predestined for the plaintiff. And I think that is an important question that goes to

whether this settlement is fair, adequate and reasonable.

And on this record, I would suggest that that finding can't be made because the information has not been provided.

THE COURT: Even if I was to find that it was predestined for the plan and it didn't happen as early as it could have or attorneys' fees were incurred when they shouldn't have been or whatever, why would that mean that I wouldn't approve the plan? I mean, isn't it still in everybody's interest to get the money into the receivership for the benefit of the participants?

I mean, I might take that up later in the context of the attorney fee application, I guess, that's one place it can come up, but it doesn't seem like that's an argument that would preclude the settlement from being approved.

MR. KESSIMIAN: I think if the Court carves that out on the attorneys' fees, that would go a long way. If the Court also carves out on the releases. Because the other issue is we don't know what else could have been accomplished for the releases.

THE COURT: I just don't see why I have to get into that. That seems to me just the flipside of the coin about the effectiveness of the special statute. I

mean, your interest, your client's interest, in all of this, only arises if and when you have liability. And if you have liability, then you go back against the settling defendants and presumably against their principals or their fiduciaries for contribution.

Now, they may say, well, we've got this special statute. They may say we've got a release. To that you will say, we don't care about any of that. We're not parties to that. The special statute's unconstitutional. We get to recover or we get contribution from you. And at that point that would be litigated.

MR. KESSIMIAN: I'd point out a couple things, your Honor. Admit, it's a very good, interesting question. The first response I would have to that is I don't know whether it's true that our contribution rights would arise at a time you suggested. I know my brother mentioned that on the other side. But I thought in *Brown*, in the Depco case, at least as far as the Rhode Island Supreme Court was concerned, when engaged in a due process analysis of whether the changing of contribution rights could be challenged, the Supreme Court of Rhode Island suggested in that Depco case that the rights to contribution arise at the time of the underlying tort.

So I'm not sure that the contribution rights aren't extant at this point. The plaintiffs' allegations of the underlying tort certainly predate this suit.

The second question I have, and this applies to the securities context, which is -- and I can cite the case, your Honor, *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, where the Court suggests there that at the time of approving a settlement, that the non-settling defendants are entitled to know how their contribution rights will be affected and what the mechanism for setoff would be.

I think it's okay if everything is kind of preserved on some level, but I do think it's not entirely true to say that there's no interest in terms of analyzing this precise question at this point in time. And I think if we proceed along the lines I suggested at the beginning of my discussion where we're preserving any preclusive effect not only on the settlement statute but on the releases, I think we might avoid that problem. But if we don't, I think we face it. And I think there we're going to have to grapple with it.

One more thing. I know my time is up, your Honor. There is a question about, you know, proceeding

on a receivership in federal court. Obviously, I haven't spoken to the clients yet, but I'll throw out an important consideration which is there's no doubt that the retirement plan at this point in time is an ERISA plan now. And so it raises the question if it is an ERISA plan right now because indisputably the fiduciary of the plan is certainly not associated with the Catholic church, it's the receiver appointed by the state court. I think it's an ERISA plan indisputably at this point. Which I think raises all the questions we talked about and it makes sense for this Court's involvement.

Judge, could I incorporate all my arguments in the brief on constitutionality?

THE COURT: Yes. Thank you.

All right. Mr. Wistow.

MR. WISTOW: Your Honor, I'm torn between your obvious desire for me to be very, very brief and the profound obligation I feel for the participants to exhaust the many issues that have been raised here. I will do my level best. I ask you to indulge me.

First of all, there was an unintentional misstatement. The Diocese entered a general appearance in the receivership. They were not shown the door for lack of standing. They participated in the objections,

wrote extensive briefs. And I just want to read you briefly what Judge Stern said about their standing which will relate, I believe, to everything you need to do here.

He said -- and I'm talking specifically about Mr. Halperin's point, this convoluted issue about the 15 percent and are we breaching the agreement? Is it covered by the hospital statute? Where does that thing stand? When are you going to decide that, Judge?

Here's what Judge Stern said: Unless and until the receiver attempts to enforce any rights in PCC through CCB, this Court does not have the, quote, luxury of rendering advisory opinions. Whereas here the points are, quote, of an academic nature only. See *Blue Cross of Rhode Island vs. Cannon*, a case from this court in 1984 and he quotes a very eloquent statement, quote, from Blue Cross, In the absence of a dispute ripe for adjudication in the legal sense, these issues cannot be scratched by this Court. The Prospect entities have not suffered formal legal prejudice that would justify this Court engaging in a nontraditional task of dissecting a settlement agreement like the PSA. I would also add, and like the complex statute.

In our briefs, we wrote two things. One, they had no standing to raise this now. It's premature.

But in any event, there would be subsequent litigation if we were fortunate enough and your Honor approved to give us this admittedly questioned asset. It's a disputed asset. They say it can't be transferred. We say it can.

But the most elegant response to how to treat that is made by Mr. Halperin himself in his brief, document 101, page 34. He says, and I quote, Based upon the arguments made by plaintiffs, only one thing is clear. It is exceedingly likely that should the settlement agreement be approved in its current form, additional litigation will ensue based not only on the security agreement already granted by CCB but any future transfer or exercise of control not in compliance with the provisions of the agreement.

THE COURT: Okay. I have great respect for what Judge Stern said in his decision and he was being very thoughtful --

MR. WISTOW: I'm referring to Mr. Halperin.

THE COURT: I know what you're referring to, but you started with by quoting Judge Stern's opinion. The question or point is going to go back to that.

He was being very careful to stay within the lines of what he was being asked to do which was in the context of the receivership. He was simply being asked

by the receiver for the authority to proceed with the settlement which he knew would then be brought to this Court with the present motion to approve the settlement. So he was viewing the question that he was being asked to rule on appropriately is a very narrow question.

But the fact that he kept it narrow and kept his decision narrow doesn't mean that these issues that Mr. Halperin has raised go away. They don't go away.

MR. WISTOW: They don't go away.

THE COURT: And they are going to be ripe at some point if the receiver attempts to exercise the put.

MR. WISTOW: Without a question.

THE COURT: When that happens, something else is going to happen. Now, I don't know if it's going to happen in state court or it's going to happen here, and I don't know exactly the forum that it's going to take, whether it's going to be in the form of a further objection to the request by the receiver to exercise the put or if it's going to be the filing of a temporary restraining order by the Prospect entities to enjoin the receiver from exercising the put or taking the steps, but they're not going to just sit back and let it happen. They're going to --

MR. WISTOW: Of course not.

THE COURT: -- address it. And so at some point some judge is going to have to wrestle with the issues that Mr. Halperin has, I think, legitimately brought up. And this question of compliance with the Hospital Conversion Act and so forth is going to have to be examined. So you don't -- you're not going to be able to weave around it.

MR. WISTOW: I'm not trying to. I'm willing to stipulate, your Honor, that all I'm asking for is an assignment of that claim. And I will be forced, as Mr. Halperin acknowledges, to get involved in litigation. This happens in bankruptcy very frequently in the settlement of cases. There may be an assignment by the debtor to a creditor of a claim that's going to be disputed. And that dispute is not resolved in the bankruptcy court. It's the person who gets the assignment goes off and he brings his suit wherever it is. And the fact that it was assigned does not indicate there's any merit.

In fact, I remember we cited a case where there was a Texas district court approving a bankruptcy settlement of an assignment of a legal malpractice case. And the Texas district court judge said, you know, I think it's rather doubtful that this is even

assignable. But he allowed the assignment as part of the settlement and off they went. It really is not relevant for our purposes which way it ended up.

That's all -- I'm willing to stipulate on the record that if your Honor approves the transfer of that claim, you are not saying at all that we are legitimately entitled under the Hospital Conversion Act or the AHM to have this, nor am I saying that the transfer to us was not a breach. All I'm saying is that the court allowed us to transfer. Whether we pursue it, whether we don't pursue it, that's another issue and where we pursue it.

I would respectfully submit that a pursuit of those claims would be a court of general jurisdiction, not actually the receivership court. Just the way it wouldn't be a bankruptcy court that decided what was the malpractice case; was it a good case or a bad case?

Now, I want to go on to say, your Honor, that this issue about not getting the information from the directors -- bear with me for one moment if you would. That would really -- if I may backtrack.

The purpose of a good-faith settlement, the purpose of a decision for a good-faith settlement, is under the new statute, 23-17.14-35 and a couple of things have to be shown to get around a good-faith

settlement finding. Because it says for purposes of this section, a good-faith settlement is one that does not exhibit collusion, fraud, dishonesty or other wrongful or tortuous conduct intended to prejudice the non-settling tortfeasors. So they are going to show two things --

THE COURT: I'm not going to rule under that statute. Nothing I'm doing is going to relate -- whatever order I issue, I can assure you, is going to exclude any reference or the ability to read it as expressing any view about the applicability or the compliance with that statute.

MR. WISTOW: Will you -- I must ask you to make a finding as to whether it's a good-faith settlement or not in general.

THE COURT: I'm going to find --

MR. WISTOW: Otherwise, it's useless.

THE COURT: I'm going to stick to Rule 23 and what the requirements of Rule 23 are.

MR. WISTOW: Will you not make a finding as to whether or not it's a good-faith settlement because --

THE COURT: How is that required by Rule 23?

MR. WISTOW: It's not. But it's required by the settlement agreement.

THE COURT: But that's between you and the

settling parties.

MR. WISTOW: That's the settlement we submitted to this Court.

THE COURT: Okay. Then what I need to find is numerosity of the class, the common effects.

MR. WISTOW: Right.

THE COURT: The typicality and their representative parties fairly and ethically protect the interest and then whatever -- I forget what -- you're bringing this under 23(b), but I think it's -- is it 23(b)(3), was it?

MR. WISTOW: I'm not sure of the number, your Honor, but at the risk of confusing the situation, I must say clearly that a condition required by the defendants to do all this was a finding of good faith under the statute. I'm not asking you to find it's constitutional. I'm not asking you to find anything other than it was good faith.

THE COURT: Well, it seems like you're dialling back what you said at the very beginning.

MR. WISTOW: How so?

THE COURT: That you didn't want me to make any findings related to the applicability of the statute.

MR. WISTOW: No, no, that's not what I'm saying. What I'm saying is, I'm not asking you to make a

finding as to the constitutionality of the statute. I'm just asking you to make a finding as to good faith because that is an absolute requirement of the settlement.

I'll tell you right now, your Honor, if your Honor refuses to do that, then there is no settlement. And I'm saying that so we all understand what exactly the settlement is about. I am not for one moment suggesting, and I'll stipulate that if your Honor makes a finding of good faith under the settlement, I will stipulate that that is not a finding that is constitutional. It's not a finding that's binding on the defendants in any subsequent challenge. It's simply a finding of good faith.

And we've briefed this rather extensively. By the way, in --

THE COURT: Good faith is the key -- isn't good faith the key provision of the special statute?

MR. WISTOW: Yes, it is, absolutely. And I want to say this, your Honor: This isn't the first time this has come up. This has come up multiple times.

THE COURT: So how do I make a full determination of good faith?

MR. WISTOW: With your Honor's indulgence, I'll tell you.

THE COURT: All right. Go ahead.

MR. WISTOW: Judge Lagueux ruled on this very same question in *Gray vs. Derderian*, the Station fire case. What he said -- and this was in accordance with law throughout the United States -- there is a presumption that the settlement has been made in good faith and the burden is on the challenging party to show that the settlement is infected with collusion or other tortuous or wrongful conduct. The First Circuit, your Honor, in an earlier case said, and I quote, To establish collusion intervenor must demonstrate fraud, the use of fraudulent means or the use of lawful means to achieve an unlawful purpose.

So I ask your Honor to please read the cases that we've cited. I'm sure you have and I probably didn't write it very well. But they have to show that the settlement's infected with collusion. And they must also show it was intended to prejudice the non-settling tortfeasors. They can't use the disproportionate sense --

THE COURT: Well, a great deal of their argument with respect to prejudice was your own fault because you put things in the settlement agreement that suggest that their liability is greater than other parties' liability.

MR. WISTOW: I didn't put that in.

THE COURT: Well, somebody put it in.

MR. WISTOW: Your Honor, what happened was the plaintiff -- excuse me, the settling defendant wanted to put that in. I did not agree with that. I didn't disagree with that. It was a back-and-forth negotiation. After all was said and done, I got almost everything. That's a self-serving statement by the plaintiff which may or may not mean anything.

THE COURT: Well, obviously, they are going to object to that and they find they have issues with that, it looks like collusion to them. I mean, you can't blame them for objecting on those grounds.

MR. WISTOW: I don't blame them. I don't blame them. But I ask your Honor to look at it. If it were up to them to decide, it would be collusion, there's no doubt about that. Fortunately, it's not up to them. It's up to you.

THE COURT: Well, what I heard Mr. Halperin say was, frankly, not a really vigorous objection to the settlement going forward. I heard him say that they support the idea of joint appointment. That they want to see the money go to the plan. They've got issues with respect to some of the provisions in the -- particularly with respect to the put and the

implications for the Prospect entities' change of voting rights and potential change of composition, and that they think that ought to be -- there ought to be some oversight to that. And they're concerned about the contract breaches.

And of course, they're concerned about these gratuitous statements about who is more at fault. But, you know, what -- the gist of what I got from him, and he can stand up and correct me if I'm wrong, was, you know, if these issues were taken care of, we don't really have a big problem with the money going to the plan. That's what I got.

MR. WISTOW: Your Honor, this business, for example, on the statement that was insisted on --

THE COURT: I'm just saying that doesn't sound like a screaming objection that this is collusive and in bad faith.

MR. WISTOW: You'll have to ask Mr. Land about that. That was not something that I put in. It's a contract, it's two parts. I want to read you something that Judge Lagueux said on what I believe is the very issue your Honor is addressing, this gratuitous statement by CCB that their percentage is smaller in terms of fault.

First of all, as a matter of substantive law, it

doesn't really matter because if they were 99 percent at fault and the Prospect entities were 1 percent at fault, at common law, I would collect a hundred percent if I wanted from the 1 percent as your Honor knows. But here's what -- the same argument was made to oppose the settlement in the *Station* fire where they were saying, look, this is ridiculous, you're letting go one of the most culpable people and you're not paying any attention to the degree of fault. And here's a quote from the *Derderian* case. Judge Lagueux said, It would be incongruous to conclude that while the 2006 amendments expressly removed the proportionate liability requirement from 10-6-7 and 10-6-8 to encourage pretrial settlements in single occurrence mass torts, the General Assembly simultaneously intended to silently restore proportionate liability as a component in the good faith analysis of the settlement and reintroduce that impediment, reading proportionate liability into the 2006 amendments which are expressly excluded by applying the proportionate liability or totality of the circumstances standards for good faith after it had been expressly removed as it has here would frustrate, if not negate, the entire purpose of the amendments. That's what we have here.

I personally have no objection, if Mr. Land

doesn't want that in there, but it was a contract and I got him -- you know, one of the things that has been said here, your Honor, that really is most disturbing to me of anything in the case, as a point of personal privilege, your Honor, I would ask you to give me a little bit of time to address it. And it's the idea that all of this money was going to go flow into the fund anyway and we accomplished nothing.

THE COURT: We're going to deal with that on the attorneys' fees.

MR. WISTOW: It has to do with good faith. And as a matter of fact, your Honor, if your Honor is ready to put that out of your mind, I won't press it. But they have misstated completely what the record is on that. And I can show your Honor where they're absolutely wrong on that and I --

THE COURT: Well, you'll have a chance to do that when we get to the attorney fees.

MR. WISTOW: Then I'm going to implore your Honor to disregard those statements in connection --

THE COURT: Here's what I'm concerned about is you have a settlement that has a lot of statements in it, representations in it. These non-settling defendants say, look, all these statements, those look collusive to us, those look problematical to us. And

you want me to approve them as all in good faith and noncollusive so that you can -- let me finish. You want me to approve the settlement precluding all of those statements to -- as made in good faith so you can fit them into the parameters of the special statute.

I'm not sure I'm prepared to do that. I may well be prepared to say this settlement complies with Rule 23 because the representations in the settlement agreement between the parties, I don't really have anything to say about that. People can say whatever they want in their settlement agreements. Now you're asking me to go a step further and say that it was all done in good faith and so forth.

So, you know, but having said all that, I'm hearing a little bit different argument from Mr. Halperin than I thought I was going to hear.

MR. WISTOW: May I point out, your Honor, that what we're asking the Court to do is set forth expressly in docket 632. And the only reference to good faith is with reference to the new statute. We are not asking the Court to -- and I have no problem whatever in the Court saying that it is not passing in any way, shape or form on any representations unilateral or what on most specifically the one that seems to bother them the most, the statement that Land

says he has little liability which wouldn't be binding on anybody anyway.

But I have no problem with your Honor saying you absolutely paid no attention to that, you give no imprimatur to that. And I again implore your Honor to look at the proposed order we're asking you to sign.

THE COURT: All right. What I'm going to ask you to do -- I'm going to ask you to do two things. First is I think you should go back to that order and take a look at it and see if you think any -- based on all that's been discussed today, do you think there's any changes to that order that should be made. And then I'm going to ask that you submit that to defendants and they can comment on that order on the aspects of it that they agree with or would not have a problem with and those that they would have a problem with with the understanding that where my thinking is right now --

MR. WISTOW: I see what you're saying.

THE COURT: Let me just explain so they see.

MR. WISTOW: Forgive me, your Honor.

THE COURT: Where my thinking is right now is that this settlement complies with Rule 23 and probably should be approved, but that these issues that have been raised I think are legitimate issues and need to

be at some point addressed. And I'd like the defendants to comment on the order with that understanding of what my feeling is about it.

And then the second thing I'd like you to do, just to make sure that this is done in a thoughtful way, is to give me any submission that you think you should with respect to whether this should be converted into a joint receivership. I haven't had a chance to talk to Judge Stern about that idea or to really give it much thought myself, but I think I'd like to hear from the parties about that after you've had a chance to kind of think it through a little bit. So that's what I think you should do.

The third thing that you might want to think about is whether your -- well, if it can be done in the proposed order, essentially whether the statements that are offensive to the non-settling defendants can be disclaimed sufficiently and a finding of good faith made for those who need to be completely excised from the settlement agreement. So I'd like you to think about that and start to figure it out.

MR. WISTOW: I'm starting to premise that your Honor doesn't want to inadvertently seem to be giving an imprimatur to statements that you shouldn't be giving an imprimatur to. I'm going to try to draft an

order that is extremely limited and preserves whatever rights the defendants may have that we think they should have. And hopefully -- I doubt we'll come to an agreement because I'm convinced they've just decided they are going to starve the beast, but perhaps I can convince your Honor the legitimacy of the order. So we'll attempt to do that. Thank you, your Honor.

THE COURT: Let me just try to say one more time so that I'm really clear on what I'm looking for. If you want me to make a finding of good faith in addition to findings under Rule 23, then I think it's important that whatever is said in the order clearly preserves to the non-settling defendants whatever rights they think that they have and that this process, this settlement that you have with the settling defendants, does not in any way impede them or obstruct them with the exercise of those rights, whether it's regarding the Hospital Conversions Act in ownership or whether it's the assertion of claims they may have against fiduciaries or if it's their claim that the special statute is either unconstitutional and unenforceable.

MR. WISTOW: Absolutely.

THE COURT: All of their claims should be fully preserved. And if you can do that, then it seems to me I can say that your settlement with the settling

defendants is in good faith and not collusive because it doesn't attempt to prejudice them in any way. That's sort of a compromise position. I hope I made myself perfectly clear.

MR. WISTOW: Also with one exception. Of course it's going to compromise them potentially. It's got to wrongfully compromise them.

THE COURT: Well, it may compromise them in the sense of their ability to seek contribution later on, but their right to assert that it does not have to be --

MR. WISTOW: Absolutely. I agree with that. 90 percent of my argument about the constitutionality of the statute was just that, that it's premature. Judge Selya's decision makes it absolutely clear. So, again, I apologize for my ebullience, your Honor, but I've got a lot of people here that will beat me up if I don't stand up for them.

MR. SHEEHAN: Your Honor, may I just as a point of clarification with what your Honor suggested, your Honor, the finding by the Court that this is a good-faith settlement within the parameters of the definition in the special statute is intended to be binding. It is not something that the defendants at a later proceeding can say, well, it wasn't really in

good faith. If we cannot good that, then we have no settlement.

THE COURT: Well, it can be binding on the parties and it can be a finding that they operated in good faith and as long as it doesn't compromise their rights.

MR. SHEEHAN: As all their other rights, absolutely, your Honor.

THE COURT: Then I don't really have a problem saying it was in good faith, and I don't think that they would either.

MR. SHEEHAN: Thank you. And I apologize for perhaps asking that clarification.

THE COURT: It's fine. You all follow what I'm getting at?

MR. HALPERIN: I follow what you're getting at, but I don't think that we all have information that relates to this settlement or to agree to anything. Your Honor's finding will be based upon what your Honor has heard and read. Other issues have been brought up that we honestly know nothing about this settlement other than the fact that we've read the agreement. We're not in a position to agree or disagree that it's in good faith.

THE COURT: Okay. Well, we'll see what comes

and then I'll try to figure it out then. Okay. We'll be in recess. Thank you.

MR. WISTOW: Can we impose a timetable on this, your Honor?

THE COURT: Sure. How about two weeks?

MR. WISTOW: Then the response?

THE COURT: Two weeks from when they file. Okay. Thank you.

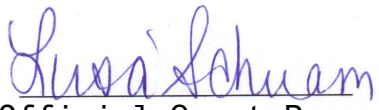
MR. WISTOW: Thank you, your Honor.

(Time noted: 1:18 p.m.)

(Proceedings concluded.)

**CERTIFICATION**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Official Court Reporter March 11, 2019