

UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

**PLAINTIFFS' COUNSEL'S MOTION FOR ATTORNEYS' FEES IN
CONNECTION WITH SETTLEMENT WITH THE DIOCESAN
DEFENDANTS**

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

October 25, 2023

Table of Contents

Introduction 1

Background 4

Argument 4

 I. The terms of the Proposed Settlement 4

 II. An award of fees pursuant to the Retainer Agreement is proper because this action is brought primarily by the Receiver on behalf of the Plan, and very much secondarily on behalf of the Settlement Class 5

 II. An award of fees based on the Retainer Agreement is proper under the particular facts of this case, including the support of the Plan participants, and because the stipulated fee is below the benchmark of 25% 7

Conclusion 10

INTRODUCTION

The law firm of Wistow, Sheehan & Loveley, PC (“WSL”) submits this motion for attorneys’ fees in connection with the proposed settlement (the “Proposed Settlement”) with Defendants Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation, and Diocesan Service Corporation (collectively the “Diocesan Defendants”). As detailed in the Motion for Preliminary Settlement Approval, the Proposed Settlement is subject to several contingencies, failing which the settlement will be void and the parties will revert to litigating their dispute. Of course, WSL’s request for fees is conditioned on consummation of that settlement and the payment by the Diocesan Defendants of the \$2,500,000 settlement proceeds.

WSL represents Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, and as Liquidating Receiver of St. Joseph Health Services of Rhode Island, CharterCARE Community Board, and Roger Williams Hospital) (the “Receiver”). Although the Receiver fully represents the interests of the Plan, to avoid any possible issues suit was also brought on behalf of seven plan participants Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque (the “Individual Named Plaintiffs”), individually and as prospective class representatives.¹

¹ Each of the Individual Named Plaintiffs entered into a separate retainer agreement with WSL which stated in pertinent part as follows:

WSL believes that the Receiver has standing to bring all necessary claims to protect participants and participants’ beneficiaries. However, it is expected that there may be issues raised as to whether or not participants and participants’ beneficiaries have the standing as to certain claims. To mitigate that potential issue, WSL is proposing to join class action claims along with the claims

Accordingly, WSL is also seeking to be appointed class counsel for the Settlement Class. WSL was previously appointed class counsel in connection with the three prior settlements (“Settlement A,” “Settlement B,” and the “Prospect/Angell Settlement”) (collectively the “Prior Settlements”) that this Court has previously approved in this case.

WSL seeks an attorneys’ fee of 23 1/3% of the gross recovery from the Proposed Settlement. This is the contingent fee set forth in WSL’s Retainer Agreement with the Receiver and approved by the Rhode Island Superior Court at the outset of WSL’s representation of the Receiver in the latter half of 2017.² This is also the attorneys’ fee approved by this Court in connection with the three prior settlements.³ It is also the fee approved by the Rhode Island Superior Court subject to the approval of this Court, in connection with this Proposed Settlement.

In support of this motion, WSL incorporates by reference Plaintiffs’ Motion for Preliminary Settlement Approval and related relief (“Plaintiffs’ Motion for Settlement

of the Receiver. You will be one of several persons represented by WSL named with regard to the class action claims.

Ledsham Dec. ¶ 14; ECF # 207-13 through ECF # 207-19 (WSL Retainer Agreements with the seven Individual Named Plaintiffs). In other words, because the damages in the case concerned underfunding of the Plan and the remedy sought was payment into the Plan, it was believed that the Receiver was the proper and sufficient party to assert all claims. The Individual Named Plaintiffs and the putative class were included, notwithstanding that they would receive no recovery apart from the obvious benefit they derive from the increase to the assets of the Plan, to moot any argument to the contrary.

² Ledsham Dec. ¶ 14; Ledsham Dec. Exhibit 6 (WSL Retainer Agreement) (the Retainer Agreement provides that “[i]f suit is brought, the [Plan] Receiver agrees to pay as legal fees twenty-three and one-third percent (23 1/3%) of the gross of any amount thereafter recovered by way of suit, compromise, settlement, or otherwise.”).

³ As a result of the Special Master’s referring to WSL’s contingent fee under the Retainer Agreement as 23.3% instead of 23 1/3%, WSL ultimately was paid a fee in the lesser amount of 23.3%.

Approval”) and the Declaration of Benjamin Ledsham (“Ledsham Dec.”) which have also been filed on October 25, 2023.

These submissions include the following four declarations, which were initially filed in the Rhode Island Superior Court on September 22, 2023 in connection with seeking the Superior Court’s approval of the Proposed Settlement, as exhibits to the Receiver’s Petition for Settlement Instructions and Approval:

- The Affidavit of the Hon. Frank J. Williams, C.J. (Ret.) (“Williams Dec.”), sworn to on September 19, 2023, concerning the mediation and terms of the Proposed Settlement, and the fees to be awarded to WSL;⁴
- The Affidavit of Arlene Violet, Esq. (“Violet Dec.”), sworn to on September 19, 2023, who represents over 285 Plan participants,⁵ in support of the Proposed Settlement and the fees to be awarded to WSL;⁶
- The Affidavit of Christopher Callaci, Esq. (“Callaci Dec.”), sworn to on September 19, 2023, who in his capacity as General Counsel for United Nurses and Allied Professionals (“UNAP”) represents the approximately 400 Plan participants who are members of UNAP, in support of approval of the Proposed Settlement and the fees to be awarded WSL;⁷ and
- The Declaration of Jeffrey W. Kasle, Esq. (“Kasle Dec.”), sworn to on September 20, 2023, who represents 247 Plan participants, in support of approval of the Proposed Settlement and the fees to be awarded WSL.⁸

⁴ Ledsham Dec. Exhibit 2.

⁵ Attorneys Violet, Kasle and Callaci were originally retained by certain Plan participants in connection with negotiations with the Plan Receiver and advocacy in the Plan Receivership Proceedings concerning the allocation of possible cuts in benefits. That is an issue in which WSL has not been and will not be involved.

⁶ Ledsham Dec. Exhibit 3.

⁷ Ledsham Dec. Exhibit 4.

⁸ Ledsham Dec. Exhibit 5.

BACKGROUND

Having already approved the three Prior Settlements in this case, the Court is already fully familiar with the complex travel of this case and the much broader factual scenario set forth in Plaintiffs' Motion for Preliminary Settlement Approval, such that there is no need to repeat.

ARGUMENT

I. The terms of the Proposed Settlement

The terms of settlement are set forth in the Settlement Agreement.⁹ Under the agreement, the Diocese will make a \$2.5 million payment to the Plan Receivership, upon the occurrence of the following events:

- First, the Court agrees to stay¹⁰ the pending litigation pending the action by Pension Benefit Guaranty Corporation ("PBGC");
- Second, as of an appropriate time (expected to be no sooner than the Spring of 2024) the Plan's Receiver will seek to have PBGC terminate the Plan, and PBGC agrees to take over the Plan;
- Third, PBGC agrees, upon Plan termination and trusteeship, to release, or to not assert, any claims against any Diocesan-related entities;
- Fourth, PBGC agrees to provide the maximum statutory guaranteed benefits; and
- Fifth, the Court and the Superior Court¹¹ approve the settlement terms, including complete releases of all claims by the settlement class, with the Court certifying a settlement class.

⁹ Ledsham Dec. Exhibit 1.

¹⁰ That condition has already been satisfied. See ECF # 261 (Stipulation and Consent Order entered August 31, 2023).

¹¹ The Superior Court has already approved the settlement terms. See Ledsham Dec. Exhibit 11 (October 18, 2023 Order).

Should any of these conditions not be met, the Settlement Agreement will become void, no payments will be made, and all claims and defenses will remain outstanding.

WSL requests that the Order granting its motion for fees expressly provide that the award of fees is conditional upon the occurrence of these contingencies.

II. An award of fees pursuant to the Retainer Agreement is proper because this action is brought primarily by the Receiver on behalf of the Plan, and very much secondarily on behalf of the Settlement Class

Fed. R. Civ. P. 23(h) recognizes: “In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law **or by the parties' agreement.**” (emphasis supplied). In connection with the Proposed Settlement, it is the Receiver’s fee agreement with WSL that appropriately governs WSL’s fee award.

This action has been brought primarily by the Receiver on behalf of the Plan. The Receiver’s right to sue on behalf of the Plan derives both from his appointment by the Superior Court¹² and by the resolution of the Board of Trustees of SJHSRI transferring to and vesting in the Plan Receiver “all rights and powers of the Corporation [SJHSRI] as sponsor and administrator of the Plan...”¹³ While Plan beneficiaries will certainly and obviously benefit from the Proposed Settlement, their benefit is indirect, inasmuch as the net settlement proceeds are to be deposited into the Plan and will ultimately be distributed to Plan beneficiaries in the form of their normal Plan benefits.

¹² The order appointing the Receiver gives him plenary authority over the Plan, including specifically “full power to prosecute, defend, adjust and compromise all claims and suits of, by, against or on behalf of” the Plan. ECF # 207-9 (Order dated October 27, 2017) ¶ 5.

¹³ ECF # 174-4 (Resolutions of SJHSRI’s Board of Trustees adopted on October 20, 2017).

That is exactly what happened with the prior three settlements approved by this Court in 2019 and 2021.

The Retainer Agreements with the Individual Named Plaintiffs reflect that while it was believed that the Receiver was the proper and sufficient party to assert all claims, the reason suit was also brought on behalf of any Plan participants was to moot any argument that the Receiver lacked standing.¹⁴ Indeed, the law of trusts is clear that a trustee has standing to bring suits on behalf of the trust and need not join the beneficiary. See Bogert's The Law of Trusts and Trustees § 594 (June 2020 update) ("The trustee brings suit in his own name and ordinarily need not join the beneficiary as a party. The very nature of a trust implies a power in the trustee to represent the beneficiary in actions against or by a third party.") and § 593 ("If suit is brought by or against the trustee, is the beneficiary a necessary party? Generally, the beneficiary is held not to be a necessary party.") (citations omitted). It was the concern that the defendants might argue that an exception to the general rule might apply here that led to this suit also being a class action.

Thus, while the Proposed Settlement seeks certification of the Settlement Class and can be understood as creating a common fund on behalf of the Settlement Class, it can also be understood as a recovery on behalf of the Plan, through WSL's performance of the terms of a contractual fee agreement that the Receiver entered into on behalf of the Plan, with the approval of the Superior Court. In this respect, the posture of this fee application is very different from other more typical class action

¹⁴ Ledsham Dec. ¶ 14; ECF # 207-13 through ECF # 207-19 (WSL Retainer Agreements with the seven Individual Named Plaintiffs).

contexts (for which the instant fee application, in any event, would still be appropriately granted).

II. An award of fees based on the Retainer Agreement is proper under the particular facts of this case, including the support of the Plan participants, and because the stipulated fee is below the benchmark of 25%

In connection with prior fee applications, WSL has fully surveyed the applicable case law and the specific facts that support its fee application. Most importantly, the Court has already fully considered these issues. On July 20, 2021, the Court conducted its fairness hearing on the Prospect/Angell Settlement. During that hearing, the Court addressed his approval of WSL's fee of 23 and 1/3 percent and stated:

Just by way of sort of general comments with respect to this approval, I don't believe it would -- as I've indicated earlier, that it's either necessary, nor would it be all that much help to anyone for me to write an opinion in this case. One of the reasons I feel that way is not just its uniqueness, but I think this is about the most well-supported and thoroughly vetted settlement and request for attorneys' fees that I've seen, and I've presided over a number of class actions which have resulted in settlements. But by the time it's gotten to me at this juncture, it has essentially been vetted and approved by Judge Stern, with a very thorough and well-reasoned and compelling written opinion which has been referenced here. The affidavit of Retired Chief Justice Williams, which is also comprehensive and thorough and places the case and the settlement and the attorneys' fees award in context. The fact that the fee award was negotiated by a very sophisticated receiver, Mr. Del Sesto, who is as experienced in these matters as anyone in the bar and who I think negotiated a very good fee arrangement and contract with the Special Counsel on behalf of the members -- on behalf of the receivership I should say. And it comes to me not only with all of that support but now, as we've just heard on the record, the support in the affidavits of Mr. Callaci and Ms. Violet and Mr. Kasle on behalf of the individual members of the Plan who are the ultimate beneficiaries of this settlement when the money is paid. And all of that in combination just overwhelmingly suggests to me that the settlement is fair and reasonable and for the benefit of all of these members.

In addition to that, the percentage strikes me as more than reasonable I think that in the circuit -- the cases have been cited. I've commented on this in prior decisions, but the percentage-of-fund method has been adopted and approved by the First Circuit and in the district courts. And I think the actual percentage here, the 23 1/3, is well within the usual percentages that are approved. It's been noted that those are typically between 20 and 30 percent. In my experience, they're sometimes over 30 percent. So I think that 23 1/3 percent that was negotiated here is more than reasonable.

And that's especially true in light of the complexity of what -- complexity of this case. It is among the certainly top three or four of most complex cases that I have been involved in, although my own -- I will say very thankfully that most of the complexity has been dealt with on your side of the screen and not on my side of the screen and maybe in Judge Stern's court. I think we have -- on this side we've skated a little bit free of the rancor and the -- maybe not all the rancor, but a lot of it and some of the complexity.

I think Mr. Wistow mentioned the *Loestrin* case.^[15] I don't see anybody on this screen who was involved in that case, but don't underestimate the *Loestrin* case. There were 25 testifying experts and 50 substantive motions in limine and settled right after I impaneled the jury and just before opening statements. And it was, I think, a \$300 million settlement, if my recollection serves me correctly, in an antitrust class action, multidistrict litigation case. So I put this maybe in that same league.

So when I look to the 23 1/3 percent, and just by my own experience comparing it to some other cases where certainly higher percentages have been approved for equal or lesser intensity of work, I will say that I think that Mr. Wistow and Mr. Sheehan and their firm have -- did some really exceptional lawyering and very creative and very tenacious so I have no trouble approving that fee award.

So I don't think it really is necessary for me to say too much more than that.

ECF # 218 (July 20, 2021 Hearing Transcript¹⁶) at 42–46.

¹⁵ Referring to *Loestrin 24 Fe Antitrust Litig.*, No. 1:13-MD-2472-S-PAS, 2020 WL 5203323 (D.R.I. Sept. 1, 2020) (Smith, J.) (approving attorneys' fees of 33 and 1/3 percent).

¹⁶ Attached hereto as Exhibit A.

WSL's fee application also has the support of all of the Plan participants that are represented by counsel in the Receivership Proceedings.¹⁷ Over one thousand (1,000) of the Plan participants are represented by counsel in the Plan Receivership Proceedings: Attorneys Arlene Violet represents 357 Plan participants;¹⁸ Attorney Jeffrey Kasle represents 247 Plan participants;¹⁹ and Attorney Christopher Callaci, as General Counsel of for the United Nurses & Allied Professionals ("UNAP"), represents 400 Plan participants.²⁰ All of these Plan participants through their counsel have affirmatively indicated their support for WSL's fee application.²¹

In addition, the Mediator, Retired Chief Justice Frank Williams, has also addressed WSL's fee application:

It is my opinion that substantial work and effort was performed by WSL in litigating the federal action and the parallel Superior Court actions, and in presenting their claims in such a way to produce a valuable settlement for all participants by increasing the assets of the Plan and the likelihood of PBGC taking over the Plan. Based upon my experience as a judge and as a mediator, it is my opinion that a request by WSL for an attorneys' fee in

¹⁷ Ledsham Dec. Exhibit 3 (Violet Affidavit) ¶¶ 9-10 ("I understand that the Plan Receiver and his Special Counsel, Wistow, Sheehan & Loveley, PC, will be asking for approval of attorneys' fees of 23 1/3 % pursuant to the original retainer agreement approved by this Court on October 17, 2017. . . . On behalf of my clients, I urge the Court to approve the Proposed Settlement (including attorneys' fees) with the aforesaid entities."); Ledsham Dec. Exhibit 4 (Callaci Affidavit) ¶ 6 ("I understand that the Plan Receiver and his Special Counsel, Wistow, Sheehan & Loveley, PC, will be asking for approval to bring that settlement to the U.S. District Court, and, in connection therewith, for payment of the contingent legal fee agreed upon in the Engagement and Fee Agreement approved by this Court on October 17, 2017, i.e. 23 & 1/3%."); Ledsham Dec. Exhibit 5 (Kasle Declaration) ¶ 7 ("On behalf of the nearly 250 participants in the St. Joseph Health Services of Rhode Island Retirement Plan whom I represent, I fully support the settlement. I understand that the Plan Receiver and his Special Counsel, Wistow, Sheehan & Loveley, PC, will be asking for approval to bring that settlement to the U.S. District Court, and, in connection therewith, for payment of the contingent legal fee agreed upon in the Engagement and Fee Agreement approved by this Court on October 17, 2017, i.e. 23 & 1/3%, and support that as well.").

¹⁸ Ledsham Dec. Exhibit 3 (Violet Affidavit) at 1.

¹⁹ Ledsham Dec. Exhibit 5 (Kasle Declaration) at 1.

²⁰ Ledsham Dec. Exhibit 4 (Callaci Affidavit) at 1.

²¹ Ledsham Dec. Exhibit 3 (Violet Affidavit) ¶¶ 9-10; Ledsham Dec. Exhibit 4 (Callaci Affidavit) ¶ 6; Ledsham Dec. Exhibit 5 (Kasle Declaration) ¶ 7.

the amount of twenty-three and one-third percent (23 & 1/3%) of the \$2,500,000 settlement fund, in accordance with their Court-approved fee agreement with the Plan Receiver, is reasonable and appropriate given the complexity of this matter and the significant relief recovered by WSL if the settlement is consummated.^[22]

Accordingly, an award of fees based on the Retainer Agreement is proper.

CONCLUSION

WSL's fee application for 23 1/3% of the gross settlement proceeds of \$2,500,000 should be approved, conditioned upon satisfaction of the contingencies in the Proposed Settlement and the payment of such sum by the Diocesan Defendants.

Respectfully submitted,

/s/ Max Wistow

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

Dated: October 25, 2023

²² Ledsham Dec. Exhibit 2 (Williams Affidavit) ¶¶ 14–15.

Exhibit A

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

-----X
Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, Plaintiffs, : 18-cv-000328(WES)
: United States Courthouse
: Providence, Rhode Island
vs. :
Prospect CharterCARE, LLC, et al., Defendants. : Tuesday, July 20, 2021

BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES 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 Defendants: PRESTON W. HALPERIN, ESQ.
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860

DAVID R. GODOFSKY, ESQ.
STEVE BOYAJIAN, ESQ.
Alston & Bird, LLP
950 F Street, NW
Washington, D.C. 20004-1404

THOMAS S. HEMMENDINGER, ESQ.
Brennan, Recupero, Cascione, Scungio & McAllister, LLP
362 Broadway
Providence, RI 02903

Lisa Schwam, CRR-RPR-RMR
Official Court Reporter

1 (VIA VIDEO CONFERENCE)
2 20 JULY 2021
3 THE COURT: We're here in the matter of Stephen
4 Del Sesto, Receiver, of the St. Joseph Health Services
5 of Rhode Island Retirement Plan vs. Prospect
6 CharterCARE, LLC, et al. And we're here for the final
7 fairness hearing on the class settlement.
8 So let's have all counsel who are going to speak
9 on anything -- I think we should probably have all of
10 you just identify yourselves for the record so that the
11 record is clear as to who is here for this hearing. So
12 why don't we start with plaintiffs, and then we'll move
13 over to the defendant side.
14 MR. SHEEHAN: Your Honor, it's Stephen P.
15 Sheehan appearing for the plaintiff, along with Max
16 Wistow.
17 MR. WISTOW: And Benjamin Ledsham is here also
18 sharing my screen. In case I do something stupid, he
19 can fix it. So Benjamin Ledsham also for plaintiffs.
20 MR. DEL SESTO: Your Honor, although I'm not an
21 attorney in this matter, I'm one of the litigants,
22 Stephen Del Sesto, the Receiver in state court.
23 THE COURT: Thank you. Go ahead on defendants
24 side.
25 MR. HALPERIN: I'll start. This is Preston

2

For the Defendants: MARK RUSSO, ESQ.
Ferrucci Russo P.C.
55 Pine Street, 4th Floor
Providence, RI 02903-2841

HOWARD MERTEN, ESQ.
EUGENE G. BERNARDO, ESQ.
Partridge Snow & Hahn, LLP
40 Westminster Street, Suite 1100
Providence, RI 02903

CHRISTOPHER J. FRAGOMENI, ESQ.
Savage Law Partners
564 South Water Street
Providence, RI 02903

CHRIS CALLACI, ESQ. (General Counsel)
United Nurses & Allied Professionals
375 Branch Avenue
Providence, RI 02904

ARLENE VIOLET, ESQ.

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

1 Halperin -- good afternoon, your Honor -- on behalf of
2 Prospect Medical Holdings, Prospect East.
3 MR. RUSSO: Mark Russo, your Honor, on behalf of
4 the remaining Prospect entities.
5 MR. GODOFSKY: David Godofsky, your Honor, on
6 behalf of Angell Pension Group. And Steve Boyajian is
7 here with me virtually.
8 MR. MERTEN: Your Honor, Howard Merten and Gene
9 Bernardo is also on for the Diocesan defendants.
10 MR. HEMMENDINGER: And your Honor, Thomas
11 Hemmendinger, the Liquidating Receiver for CharterCARE
12 Community Board, St. Joseph Health Services of Rhode
13 Island and Rogers Williams Hospital. Those entities
14 are also defendants in this case still.
15 THE COURT: Okay. All right. I think that
16 covers it. Oh, sorry. You were on mute there, Chris.
17 MR. FRAGOMENI: Good afternoon, your Honor.
18 Chris Fragomeni also on behalf of Prospect Medical and
19 Prospect East.
20 THE COURT: Okay. Anything else? I see some
21 activity going on here.
22 MR. CALLACI: Your Honor, Chris Callaci on
23 behalf of the United Nurses and Allied Professionals.
24 THE COURT: Got it. All right. I think that
25 covers it. Anybody else who wants to enter an

1 appearance?

2 All right. So I'll hear from the plaintiffs. I

3 take it you have a bit of a presentation to make here.

4 MR. SHEEHAN: Yes, your Honor, we do. There are

5 two motions before the Court; the motion for a final

6 settlement approval and also the motion for attorneys'

7 fees. And I'm going to address the motion for

8 preliminary settlement approval, and Mr. Wistow is

9 going to address the motion for attorneys' fees.

10 Your Honor, with respect to final approval, the

11 issues have been fully briefed. The standard on a

12 preliminary settlement approval is the probability that

13 the settlement will reach final approval and addressed

14 all of the issues that are involved upon which a

15 finding of final approval should be based. Also a

16 detailed notice was sent to all the Plan participants.

17 The briefs obviously were filed on all parties, and

18 there were no objections. Consequently, your Honor,

19 I'm not going to address all of the issues. For the

20 most part, we're going to rely on the briefs and the

21 fact that there have been no objections.

22 I would, however, like to briefly address three

23 issues. And the first issue, your Honor, is to briefly

24 describe the settlement and answer any questions the

25 Court may have with respect to the settlement. The

1 judgment on the limited issue of whether the Plan was

2 covered by ERISA. That briefing for the motion for

3 summary judgment involved thousands of pages, your

4 Honor. I'd like to say, first of all, that that

5 briefing was complete at the point in time that the

6 settlement was entered into indicating, which I think

7 all parties will agree, the posture of the case at that

8 point contributed to settlement; the fact that we had

9 gotten to that stage in the summary judgment

10 proceedings.

11 The other -- there are two or three other lines

12 of development that were going forward in connection

13 with the issues in this case but not before this Court.

14 And one was superior court litigation and a case that

15 had been brought by CharterCARE Community Board when

16 Mr. Land was still involved with that entity and then

17 was taken over by Mr. Hemmendinger as Liquidating

18 Receiver versus Prospect based upon CharterCARE

19 Community Board's initial 15 percent interest in the

20 two hospitals, Fatima Hospital and Roger Williams

21 Hospital through the corporations that own them.

22 The asset purchase agreement had obligated

23 Prospect CharterCARE to contribute \$50 million in

24 capital to those hospitals and had also, we contend,

25 had obligated Prospect to cooperate with CharterCARE

1 second issue is to briefly outline the procedural

2 developments since the Court previously approved

3 settlements in this case. And finally, your Honor, I'd

4 like to just briefly discuss the form of any order to

5 be entered granting settlement approval.

6 If that pleases the Court, I'd like to start

7 first with the observation that the two settlements

8 that were previously approved were agreed to back in

9 the fall of 2018. The approval took one year. It was

10 very complex, your Honor. We had to obtain state court

11 approval in connection with the receivership from Judge

12 Stern. We had to obtain this Court's approval with

13 respect to Settlement B. We had to go back to state

14 court for a cy-près order allowing the settlement funds

15 to be disbursed from the defendant, which was a

16 charitable foundation. The Court allowed limited

17 discovery in connection with Settlement A. Depositions

18 were taken, et cetera.

19 While that was going on, your Honor, the federal

20 court suit against Prospect, Angell and the Diocesan

21 defendants was continuing and has continued since then.

22 There were extensive motions to dismiss which reached

23 finally hearing, and at the hearing it was decided that

24 they would be dismissed -- denied, rather -- without

25 prejudice in favor of cross-motions for summary

1 Community Board in providing CharterCARE Community

2 Board with the information that was needed to determine

3 whether or not to exercise a put option, a right to

4 sell the interest back to Prospect CharterCARE. Those

5 issues were raised as breaches by Prospect in that case

6 of *CCCB v. Prospect*.

7 And that case is also a factor in the

8 settlement, your Honor, in that the settlement provides

9 that -- covers what's going to happen in CharterCARE

10 Community Board's interests in these underlying

11 hospitals. It's going to be transferred to Prospect in

12 return for a stipulated value for the shareholding

13 interest of \$4 million and \$1 million value applied to

14 CharterCARE's causes of action against Prospect apart

15 from the value of its shares.

16 Since then, your Honor, there's also been

17 initiation of the liquidating receivership brought by

18 Mr. Hemmendinger on behalf of the three entities,

19 Rogers Williams Hospital, St. Joseph and CharterCARE

20 Community Board. And that was a condition of the

21 settlement approved by your Honor, Settlement A. The

22 Plan Receiver, through counsel, has also been involved

23 as a creditor in those proceedings. That liquidating

24 receivership is also a factor in this settlement in

25 that the -- in connection with the settlement, Prospect

1 is releasing all claims it might have in that
 2 liquidating receivership as well any claims it might
 3 have as creditor.

4 Since the prior settlements were approved by
 5 your Honor, a lawsuit was commenced by Prospect in
 6 Delaware that involved Prospect's claims that
 7 CharterCARE Community Board was in breach of its
 8 obligation and obligated to indemnify Prospect for many
 9 millions of dollars and ultimately any liability that
 10 Prospect might have to plaintiffs in this case. That
 11 lawsuit, if successful, would have eliminated the value
 12 of CharterCARE Community Board's interest in the
 13 hospitals. It is being dealt with in connection with
 14 the settlement. It's going to be dismissed.

15 There were also, your Honor, administrative
 16 proceedings. Prospect filed applications for approval
 17 from the appropriate regulatory agencies for a buyout
 18 of --

19 THE COURT: We're getting some bad feedback from
 20 someplace. Off the record for a second.

21 (Off-the-record discussion)

22 MR. SHEEHAN: I was starting to address, your
 23 Honor, the administrative proceedings where Prospect
 24 wanted to buy out its majority interest, Leonard Green.
 25 Those who were before the Rhode Island Attorney General

1 and 2.75 is going to come from Angell. The settlement
 2 is going to be paid through letters of credit which
 3 when will be payable upon the Court's entry of an order
 4 along the lines of the order of final approval set
 5 forth in the settlement agreement.

6 And that requirement from the settlement
 7 agreement is that the order of final approval state
 8 that the settlement is fair, reasonable and adequate,
 9 number one. And two, it is in good faith -- a
 10 good-faith settlement under Rhode Island General Laws
 11 23-17.14-35. And of course finally, third, such other
 12 and further relief as the federal court may direct.

13 So we would request, your Honor, that the order
 14 of final approval, which is obviously going to include
 15 a number of elements, specifically include those
 16 findings so that Mr. Del Sesto may properly draw on the
 17 letters of credit and properly certify to the registry
 18 of court and to this Court that Angell's portion of the
 19 settlement should also be paid to him. Also with
 20 respect to the timing of the order of final approval,
 21 obviously plaintiffs are desirous of settlement -- of
 22 the approval as soon as possible since it is the
 23 trigger for payment. And we understand that Prospect,
 24 for business reasons, would also like to have the
 25 approval entered as soon as possible. Mr. Halperin, to

1 and the Department of Health, CharterCARE Community
 2 Board, through the Liquidating Receiver, was holding
 3 CCCB's interest in trust for the Plan Receiver and
 4 therefore was acting pursuant to the consultation and
 5 direction of Plan Receiver's counsel, Wistow, Sheehan &
 6 Loveley, objected to those applications for
 7 administrative approval and asserted that the payments
 8 were, indeed, fraudulent transfers that would have the
 9 effect of denuding Prospect Medical of assets that
 10 would be needed ultimately to meet Prospect Medical's
 11 liability in this case.

12 Those administrative proceedings are also a
 13 factor in the settlement, your Honor, as shown by the
 14 fact that one of the elements of the settlement was the
 15 requirement that plaintiffs withdraw those objections
 16 and CCCB withdraw those objections. So there have been
 17 a number of proceedings and they all, your Honor,
 18 ultimately, we contend, led to this settlement.
 19 They're extensive and detailed, and I'd be happy to get
 20 into them. They are addressed in the papers, however.

21 Next, your Honor, I'd like to just briefly
 22 address the form and timing -- well, before I do that,
 23 I had intended at the outset to state the obvious, your
 24 Honor, which is that this is a settlement for \$30
 25 million, 27.25 of which is going to come from Prospect

1 the extent the Court wishes, will address why that is
 2 the case.

3 Unless the Court has any questions or any
 4 questions about how the settlement works, I'm going to
 5 defer now to Mr. Wistow

6 THE COURT: No. Let me hear from Mr. Wistow.

7 MR. WISTOW: Thank you, your Honor. I was going
 8 to say on the issue of an order entering quickly, I
 9 think I speak for Mr. Halperin also, as Mr. Sheehan
 10 indicated, he would like it. I believe your Honor
 11 might want to issue a written decision. Obviously
 12 that's up to you. And it obviously is not unheard of
 13 to have an order enter, decision to follow. If there's
 14 going to be a decision, I imagine it would take quite a
 15 while to write it. And all the parties here, all of
 16 them, I believe, are anxious to at least have the
 17 order.

18 THE COURT: Why do you think I need to write a
 19 written decision?

20 MR. WISTOW: I don't, I don't. I'm not
 21 suggesting you do. I'm suggesting if you wish to.
 22 Obviously that's your choice, not mine. But if you
 23 wish to, I was going to suggest and am suggesting that
 24 an order enter, decision to follow. That's something
 25 that Judge Stern did in one of our more complex

1 situations in this case where there was a time element,
2 he entered the order and then wrote a decision later.
3 I'm not asking your Honor to write a decision.

4 THE COURT: My feeling about this is this
5 is -- maybe it overstates it to say that it's unique,
6 but it's pretty close to unique. It's so highly
7 complicated and idiosyncratic I think, I'm not sure
8 that there's anything that I could say in a decision
9 that would be of any value to anyone else other than
10 the parties here.

11 And all of you really care about is -- I mean,
12 you did all the work. I don't need to explain
13 anything. I couldn't explain it certainly any better.
14 I would just repeat what is said. But what you're
15 interested in, I think, is the findings and the order.

16 MR. WISTOW: No, your Honor is right. The
17 chance of this decision being precedential in some
18 future case is pretty remote. I don't expect anything
19 like this to happen in the next hundred years or so, if
20 there's going to be another hundred years, so I agree.

21 Let me address -- Mr. Sheehan addressed the
22 settlement eloquently. Speaking on behalf of the
23 Receiver and the Plan participants, I would like to
24 speak on behalf of my office with regard to the fee.

25 THE COURT: Before you get to the fee, Mr.

1 affiliates, but also the two stockholders of Prospect
2 Medical individually. A gentleman named Lee and
3 Topper. And there was an enormous amount of activity
4 in that case, none of which appears in this court, but
5 was extensively litigated in front of Judge Stern. And
6 we've also been working, along with Tom Hemmendinger,
7 the Liquidating Receiver, to try to bring to final
8 fruition some additional areas which we think would be
9 the source, and Mr. Hemmendinger agrees with us, would
10 be the source of perhaps millions of dollars more for
11 the Plan. We continue to work on those issues. They
12 involve the RI DEM, the Rhode Island department of
13 Environmental Management, the Department of Labor,
14 Beacon Insurance and, most importantly, a significant
15 number of trusts that are in favor of the old Heritage
16 Hospitals in which we believe that we can convert into
17 payments to the Liquidating Receiver which in turn will
18 go into the Plan.

19 And we've been actively working on that. That's
20 one of the complicating factors. Mr. Sheehan mentioned
21 the suit in Delaware. That was totally unexpected as
22 was the prior when we first signed onto this. Let me
23 explain a little bit about the administrative
24 proceedings and why I think they play such a big role
25 in this settlement.

1 Wistow, I'm looking at the -- so I'm looking at
2 the -- I think this is the order that Mr. Sheehan
3 referred to, but I don't think this is a final order.
4 This is the order of preliminary approval. This is
5 Exhibit D I believe to the papers.

6 Have you prepared a final order of approval of
7 the settlement, a draft, a proposed order?

8 MR. WISTOW: No. We can do that today or as
9 late as tomorrow. We wanted to -- we felt it perhaps
10 premature to do it, but we can do it today.

11 THE COURT: All right. Okay. Good enough.
12 So go ahead and tell me about the fees.

13 MR. WISTOW: All right. Well, what I can tell
14 you is that in going over this matter, in preparing for
15 it, I was startled to be reminded about just how
16 complicated it had gotten. And there were many, many
17 areas that have just simply not been before your Honor.
18 They were alluded to generally by Mr. Sheehan, but we
19 were intimately involved in all of these matters which
20 I'll touch on briefly, all of which truly led, I think
21 incontrovertibly, to the settlement that's before you.

22 For example, there is a state court suit in
23 which the receiver and the liquidating receivers both
24 joined claiming fraudulent transfers not only against
25 the Prospect Medical Holdings companies and their

1 In Rhode Island, there are two agencies that
2 deal with the kind of conversion that Prospect Medical
3 was trying to attempt, and those are the Department of
4 Health and the Department of Attorney General. And
5 they have two completely different proceedings. One is
6 called the Hospital Conversion Act and one is called
7 the Change in Effective Control. And we came in as
8 soon as we found about it, and in order to protect our
9 15 percent ownership interest in this we filed, on
10 behalf of both the Liquidating Receiver and the Plan
11 Receiver, formal objections. We appeared and argued
12 why these were fraudulent, why they should not go
13 forward. As a result of our filing extensive papers,
14 including reports from financial experts that these
15 entities were quite on the brink of insolvency, that
16 these deals should not go through.

17 And the Attorney General's office came in after
18 this and said we are going to go slowly and delay this
19 and our objections were filed in the fall of 2019. And
20 we continued to argue and submit documents. And before
21 the settlement was consummated -- I shouldn't say
22 consummated -- the settlement before you was agreed
23 upon, one of the important conditions was that the
24 plaintiffs would agree to withdraw their objections
25 from the administrative proceedings and agree not to

1 participate further in the matters nor to make public
 2 statements in the media about what they had been up to.
 3 We did withdraw that, but what happened was in
 4 June, June of this year, the Attorney General came down
 5 and, we believe, at least partially as a result of what
 6 we had stirred up, insisted on ultimately an \$80
 7 million escrow to be filed with the Attorney General to
 8 ensure that the local hospitals are able to go forward;
 9 in addition, because of the threat of insolvency that
 10 we had raised. By the way, if we may say so, our fear
 11 of insolvency was why we asked for letters of credit
 12 from JPMorgan. We were not prepared to accept the
 13 promise of the defendants to make a payment.
 14 I don't include Angell in that. Angell has
 15 deposited its share into the registry of the superior
 16 court. But in both cases we're completely secured.
 17 In any event, the Attorney General has required
 18 as of June 1st, I believe, of this year, an \$80 million
 19 escrow to help support the hospitals. And in addition,
 20 has made the hospitals agree -- made Prospect Medical
 21 agree -- to stop charging 3 percent of the annual
 22 revenues of these two hospitals as management fees.
 23 That represents a savings for the hospitals -- I'm not
 24 suggesting, by the way, your Honor, that that money is
 25 coming to the Plan Receiver, but it certainly is for

1 I believe that this litigation is unique within the
 2 United States. Other, quote, church plan, unquote,
 3 cases typically involve one employer, perhaps a
 4 hospital, continuously operating an employee benefits
 5 plan. The instant litigation involves more than a
 6 dozen defendants, each of which plaintiffs contend has
 7 liability for the shortfall in the funding of the Plan.
 8 Defendants deny any responsibility whatsoever.
 9 Then he goes on to say, This is, to my
 10 knowledge, the first, quote, church plan, unquote, case
 11 to involve even one state court-appointed receiver,
 12 much less two. Moreover, the Prospect defendants have
 13 been steadfast in their denial of liability for the
 14 shortfall in the funding of the Plan based on the fact
 15 that their agreement to purchase the assets of the
 16 failing hospitals in 2014 expressly excluded any
 17 responsibility for the sellers pension plan.
 18 Then he says -- I hope your Honor can agree with
 19 this -- he says, This matter represents one of the most
 20 complex, if not the most complex, matters in which I
 21 have been involved in all my years as a lawyer, judge
 22 or mediator. And then he goes on to discuss the fee.
 23 And I hope your Honor considers this sort of an expert
 24 opinion. He says in paragraph 13 he says, Based upon
 25 my experience as a judge and as a mediator, it is my

1 the benefit of the community. There's millions of
 2 dollars each year that are not going to be paid to
 3 Prospect Medical as a result, we believe, of the stir
 4 we caused in the administrative proceedings.
 5 I want to go on to say that other things that we
 6 never anticipated when we got into this case were the
 7 various motions to adjudge each other in contempt.
 8 This was a very heated, controversial and adversarial
 9 conversation, as you'll hear in a little bit. Now,
 10 it's not just us who are saying this is complicated.
 11 The Retired Chief Judge Frank Williams submitted an
 12 affidavit, a declaration in this case under oath, in
 13 which he indicated that he had been involved in
 14 thousands of cases over his career and insofar as a
 15 mediator, he recalled many hundreds of cases.
 16 He's been practicing, as you'll see from his
 17 affidavit, for 50 years in private practice and as a
 18 superior court judge, as the chief of the supreme court
 19 and now has been actively involved as a mediator. He
 20 described this case as, quote, complex, novel and
 21 involving unsettled questions of law.
 22 And he goes and he recites the complications
 23 that Mr. Sheehan and I have alluded to that are
 24 involved in this case but not before this Court. He
 25 ends up saying -- and I'd like to quote him -- he says,

1 opinion that a request by Wistow, Sheehan and Loveley
 2 for an attorneys' fee in the amount of 23 1/3 percent
 3 of the \$30 million settlement in accordance with their
 4 court-appointed fee agreement with the Plan Receiver is
 5 reasonable and appropriate given the complexity of this
 6 matter and the significant relief recovered by Wistow,
 7 Sheehan & Loveley.
 8 I'm going to talk about the contract that exists
 9 between our office and the Plan Receiver in a moment,
 10 but I will point out that in his affidavit he does a
 11 computation of the percentage fee that we would
 12 actually be getting based on the fact that we had given
 13 up a portion of our fees before to expedite getting
 14 some money into the Plan. And he makes a computation
 15 that we're actually, if your Honor grants the 23 1/3
 16 percent in this case, overall our fees would be 22.15
 17 percent, which is lower than what he describes in the
 18 affidavit which we put in our brief about the benchmark
 19 usually used in percentage of the fund cases.
 20 So we're below the benchmark of 25 percent.
 21 We're even below the contractual agreement we had.
 22 We're closer to the 20 percent to what he quotes is the
 23 circuit cases generally go between 20 and 30 percent
 24 with the benchmark being around 25. So we're actually
 25 closer to the 20 percent than we are even to the 25.

1 Now, I want to emphasize, if I may, the
 2 significance, we think the overriding significance, of
 3 the contract we entered with the Plan Receiver at the
 4 very beginning of our involvement back in August of
 5 2017. And I refer you specifically, your Honor, to the
 6 affidavit of Stephen Del Sesto, the Plan Receiver.
 7 That's document 2076. And the first thing I want to
 8 comment about his affidavit or declaration, I should
 9 say, but again under oath, is he says, and I quote, I
 10 have read the declaration of Frank J. Williams, CJ
 11 Retired, dated January 19, 2021, and I concur with
 12 everything stated therein. I would add that as to the
 13 litigation history of this case which began in the fall
 14 of 2017, almost precisely three years before the
 15 mediation, he says in my more than two decades of
 16 practice, I have not been involved in another matter so
 17 fiercely litigated or negotiated. That's a euphemism,
 18 I believe, for the rancor that was going on between
 19 counsel.

20 And by the way, all I can say is everybody was
 21 acting zealously, and it was at times very, very
 22 difficult. As I said, there were motions for contempt
 23 on both sides and so forth.

24 He explained also in his affidavit how we
 25 negotiated the fee of 23 1/3 percent. And he explains

1 approves this settlement, will be over 41 -- bear with
 2 me just a moment. The settlements to date would be
 3 over \$47 million in gross. That's to be compared, your
 4 Honor, to get a sense of how meaningful that is, when
 5 the original acquisition took place by Prospect Medical
 6 Holdings of the Heritage Hospitals back in 2014, the
 7 total amount allocated out of the purchase price to go
 8 into the pension plan at that time was only \$14
 9 million. And that's one of the protests -- one of the
 10 claims we made that they pulled the wool over the
 11 Attorney General's Office eyes at that time and that
 12 that 14 million was relatively meaningless.

13 Even now with gross payments of three-and-a-half
 14 times what was paid in 2014, we still have significant
 15 shortfalls. We're hoping, and I say this in looking at
 16 Mr. Reardon, we hope that we get the rest of it in
 17 combination through the Liquidating Receiver and
 18 through our remaining claims against the Diocese and
 19 the Bishop. And we hope to be back at some point in
 20 the future asking for 23 1/3 of the fees attributable
 21 to any result we get with the Bishop.

22 Now, I want to tell you specifically what Judge
 23 Stern said about this particular settlement. And this
 24 is document 206 before your Honor. And this is a
 25 transcript of the hearing where he approved this

1 how he did that as an officer of the court and as an
 2 agent of the court as Receiver. And he indicates that
 3 we actually -- shame on us -- asked for more and he
 4 negotiated us down to the 23 1/3 which we agreed to.
 5 He then went and got the okay from Judge Stern, the
 6 superior court judge in charge of the Plan
 7 receivership, and he says -- and I ask your Honor
 8 please to take this into consideration -- Mr. Del Sesto
 9 says, It is important that plaintiffs' counsel have a
 10 strong financial incentive to pursue the claims in this
 11 litigation which are legally and factually complex and
 12 extremely document intensive and span many decades of
 13 Plan administration. I believe the existing fee
 14 structure gave them that incentive and their zealous
 15 prosecution of plaintiff' claims to date indicates that
 16 belief -- excuse me, vindicates that belief. It would
 17 be detrimental to the plan receivership estate for that
 18 financial incentive be lessened and for Wistow, Sheehan
 19 & Loveley be awarded fees that are less than the fees
 20 to which they would be entitled under the retainer
 21 agreement. Again, the agreement approved by Judge
 22 Stern. Not to suggest for a moment that your Honor is
 23 necessarily bound by that.

24 Now, let me suggest so far the benefit to the
 25 Plan. The total gross payments so far, if your Honor

1 particular settlement. And of course it was necessary
 2 he do that because one of the settling parties is his
 3 receiver. So the Receiver asked for instructions and
 4 of course, you know, recommended the settlement.

5 But anyway, Judge Stern said when he approved
 6 this, in the transcript he said, I would concur with
 7 what was said. This very much is one of the most, if
 8 not the most, complicated issue in litigation the Court
 9 has before it. The only one that I can think of that
 10 may have been more complex was the case before my
 11 predecessor Justice Silverstein in another very large
 12 case involving Mr. Wistow. So I'm flattered and
 13 pleased about that comment. He was referring I believe
 14 to the 38 Studios case.

15 Now, when ruling from the bench on the approval,
 16 he said as follows, That contingency fee which was
 17 negotiated between the Plan Receiver and Special
 18 Counsel was previously approved by this Court and was
 19 approved by this Court in the prior settlements as
 20 well. With respect to the case presently before the
 21 Court in the petition, the Court finds that the
 22 contingency fees and costs are fair, reasonable and
 23 certainly for the benefit of the plan receivership of
 24 state and that contingency fee as well as reasonable
 25 costs are approved. He goes on to say recognizing your

1 Honor's role in this he says, I certainly understand
2 that Judge Smith is going to need to consider these
3 fees with respect to the class action. And that is one
4 of the main reasons, as I mentioned before, that while
5 the Court is giving a decision from the bench at this
6 point so we can proceed forward, I will issue a set of
7 findings as well to supplement the decision, in other
8 words, to aid your Honor in coming to an appropriate
9 decision.

10 Now, what's very, very, very unusual about this
11 case as a quote, class action, is that FRCP 23(c)
12 specifically says, and I quote, In a certified class
13 action, the Court may award reasonable attorneys' fees
14 and nontaxable costs that are authorized by law or by
15 the parties' agreement. Emphasis -- I'm sorry, I'm
16 reading from my own notes. So it is possible to have
17 an agreement as to attorneys' fees in a class action.
18 It would be very unusual obviously, because we would
19 need, the cases show, a very sophisticated party who is
20 one of the members of the purported lead plaintiffs;
21 one of the examples would be a situation where a
22 stockbroker feels that -- a group of stockbrokers have
23 been cheated in some fashion, wants to bring a class
24 action, is obviously much more sophisticated obviously
25 than the people who are the plaintiffs in this case.

1 enhances efficiency or, put into reverse, using the
2 lodestar method in such a case encourages inefficiency.
3 Under the latter approach, attorneys not only have a
4 monetary incentive to spend as many hours as possible,
5 but also faces strong disincentive to early settlement.
6 If the plaintiff percent-of-fund method is utilized,
7 the lawyer is still free to be inefficient or to drag
8 her feet in pursuing settlement options, but rather
9 than being rewarded for this unproductive behavior, she
10 will likely reduce her own return and hours expended.

11 Finally, one other quote from 13 appeals, the
12 First Circuit case. Another point is worth making --
13 forgive me for reading all this material, your Honor,
14 but obviously this particular motion is a peculiar
15 importance to my firm. Another point is worth making,
16 because the percent-of-fund technique is
17 result-oriented rather than process-oriented, it better
18 approximates the workings of the marketplace. We think
19 that Judge Posner captured the essence of this point
20 when he wrote that, quote, The market in fact pays not
21 for the individual hours but for the ensemble of
22 services rendered in a case of this character, unquote.
23 And then the First Circuit goes on, The marketplace
24 pays for the results achieved. Then there's a -- I'd
25 like to quote from a district court case from

1 Before I get into the relationship with the
2 individual plaintiffs and what they're getting out of
3 this, I would like to talk to your Honor about the
4 percentage-of-fund method which is what we're talking
5 about. We're talking about a percentage of the \$30
6 million. And the decisions in this circuit say that
7 the percentage-of-fund method is preferred in common
8 fund cases. And I quote from a decision from the
9 District of New Hampshire, it's in our memo, *In re*
10 *Cabletron Systems*. And they quote from the Third
11 Circuit case. They say, The percentage-of-fund method
12 is preferred in common fund cases because it allows
13 courts to award fees from the fund in a manner that
14 rewards counsel for success and penalizes it for
15 failure. And it goes on to say this is something the
16 lodestar method cannot do.

17 Interestingly enough, there's a First Circuit
18 case -- there's 13 appeals involving the fires at the
19 -- I believe it's the *Metro Goldwyn Mayer* hotel
20 complex. And I quote from that case. It says, In
21 complex litigation in common fund cases, by and large
22 tend to be complex. The percentage-of-fund approach is
23 often less burdensome to administer than the lodestar
24 method. And they go on to say, Using the
25 percentage-of-fund method in a common fund case

1 Massachusetts. And it says, quote, Within the First
2 Circuit courts generally reward fees in the range of 20
3 to 30 percent with 25 percent as the benchmark."

4 Now, your Honor, in this court in the past 12
5 months, this Court has awarded in two class actions 33
6 1/3 percent. And that's *In re Loestrin* and *Kondash vs.*
7 *Citizens*, which I submit -- and I don't mean to demean
8 the cases in any way -- were nowhere near as
9 complicated as what we've been through. And Magistrate
10 Judge Sullivan in the opinion adopted, but fully
11 adopted by your Honor, said -- I believe it's in the
12 *Loestrin* case -- and I quote her, Indeed, it is fair to
13 say that a, quote, Clear consensus among federal and
14 state courts, unquote, has emerged that the
15 percentage-of-fund approach is a more efficient, better
16 reason and effective method. Consistent with these
17 principles, the traditional one-third of the funds has
18 been routinely approved as appropriate for TCPA
19 settlements in courts in other circuits.

20 Now, what I want to say is this is very much in
21 our case because in a way it's not even a common fund
22 case. Then let me explain what I mean by that. We
23 have always regarded the principal plaintiff as the
24 Plan Receiver. And the reason that we brought in seven
25 putative class plaintiffs is actually set forth in the

1 retainer agreement that we have with those seven
 2 individual plaintiffs. And what that says -- and that
 3 also, your Honor, is part of the record in this case,
 4 the retainer agreement.

5 It says, Wistow, Sheehan & Loveley believes that
 6 the Receiver has standing to bring all necessary claims
 7 to protect participants and participants'
 8 beneficiaries. However, it is expected there may be
 9 issues raised as to whether or not participants and
 10 participants' beneficiaries have the standing as to
 11 certain claims. To mitigate that potential issue,
 12 Wistow, Sheehan & Loveley is proposing to join
 13 class-action claims along with the claims of the
 14 Receiver. You will be one of the several persons
 15 represented by Wistow, Sheehan & Loveley named with
 16 regard to the class-action claims.

17 And we disclosed to them at the time not only
 18 our relationship with Mr. Del Sesto as Receiver but
 19 attached a copy, with his permission, of the retainer
 20 agreement that we had with him. Now, the reason we
 21 added them was because the general rule is that a
 22 trustee -- and we regarded Mr. Del Sesto to be a
 23 trustee since he was operating the Plan -- the general
 24 rule is you needn't join beneficiaries but there are
 25 been exceptions. We anticipated that we would get the

1 actions go, it's different.

2 Now, in the document 207, Exhibit 13, which is
 3 the fee agreement with the class-action
 4 representatives, it expressly says that, quote, If a
 5 monetary recovery is obtained for a plaintiff within
 6 the class, it goes on to explain that we go in and seek
 7 fees for that. That didn't happen. There is no
 8 monetary recovery whatever for any member of the class.
 9 Again, not to say that they haven't benefited
 10 enormously because of it. So in a sense we're really
 11 not even seeking a fee from the class or a class fee.
 12 It's really a ratification of the payment to Mr. Del
 13 Sesto as receiver and a ratification of the contract we
 14 entered into.

15 By the way, these seven represented plaintiffs
 16 were referred to us by three lawyers. And I want to
 17 explain that because at least one of them is here
 18 today, and you have affidavits from all of them. We're
 19 talking about Mr. Callaci, who has introduced himself,
 20 representing the Union, Arlene Violet, who represents
 21 something like 357 people, and Jeff Kasle who
 22 represents 247. And let me explain what I mean by
 23 "represents" and how involved this became.

24 When the petition was originally filed in
 25 August 2017 by the Heritage Hospitals, that petition

1 most vigorous fights from the other side if we didn't
 2 add these people. I don't know what would have
 3 happened if we didn't, but that's what we anticipated,
 4 and we were very concerned because of the statute of
 5 limitations running out on some of the claims, for
 6 example, fraudulent transfers, we brought the suit just
 7 in time. And we didn't want to run across the risk
 8 that later on they could convince the Court that we
 9 should have brought in individual participants.

10 Now, it's noteworthy, your Honor, that the only
 11 benefits in any of these settlements so far, including
 12 the proposal, are not going directly to any of these
 13 Plan participants. This is not a common fund in the
 14 sense that we collect \$40-odd million and then
 15 individual plaintiffs put in their individual claims
 16 and we disburse the money or some administrator
 17 disburses the money to them depending on what their
 18 individual claim is and whether or not they respond.
 19 This is not that case.

20 This is a case where it's clear that every
 21 nickel of the settlement is going into the Plan
 22 receivership which, of course, has an enormous benefit
 23 to the Plan participants. It's just not the direct one
 24 and there is no common fund. Unless you want to call
 25 the Plan the common fund which in my belief, as class

1 was against the Plan itself. It was a petition to put
 2 the Plan into receivership. That was the receivership
 3 that ultimately resulted in the appointment of Mr. Del
 4 Sesto. But concomitant with that request to put that
 5 plan into receivership was a request to immediately
 6 reduce the benefits to all of the claimants. By
 7 "claimants," I mean the beneficiaries of the Plan. To
 8 automatically reduce everybody's payment by 40 percent
 9 immediately.

10 There was controversy between the participants
 11 as to who, if anybody, should bear that reduction. The
 12 younger people felt, for example, that the older people
 13 had been receiving payments for many years. They had
 14 just begun or hadn't even begun; they shouldn't get a
 15 reduction. The older people felt the younger people
 16 could perhaps get a job somewhere else. They were
 17 totally dependent. There was a third group I won't get
 18 into.

19 I, of course, could not possibly get involved in
 20 that issue. In our fee agreement, it says we're not
 21 going to. Each of these people who is concerned about
 22 this ended up in groups that were represented pro bono
 23 by Mr. Kasle and Mr. Callaci and by Ms. Violet. Their
 24 function was to negotiate as best they could to try to
 25 figure out what to do, who would bear the 40 percent

1 reduction, if anybody.

2 Those meetings took place with those three

3 lawyers and Mr. Del Sesto as Receiver. Again, I stayed

4 away from it completely. But when I became aware of

5 who these people were and what they were doing, I asked

6 them if they were interested in recommending

7 representative plaintiffs to join in the case. And

8 they did. And that's why I say referral by them.

9 And I want to emphasize that there's no referral

10 fee payment or anything like that. We would be

11 obliged, obviously, to disclose that to the Court if

12 there's any question of the fees that are being shared,

13 but there are not. So what we're saying here, your

14 Honor, is this in a sense is really not even a common

15 fund case, but if you consider it that, then most of

16 the cases say the percentage of the fund would be an

17 appropriate thing.

18 Your Honor, I'm not going to ask you for

19 sympathy or anything like that, but I wish to point out

20 that we are a small firm. Right now there is five of

21 us in the firm. There's a limit to how much we can do.

22 We've been consumed with this case. And we've had a

23 significant opportunity cost associated with

24 taking -- deferring action on some cases where it's

25 possible, turning away cases that came to us, and I

1 special statute that recognized that the non-settling

2 defendants would only get a pro tanto and not a pro

3 rata benefit from it. Then that was followed by the

4 *The Station* fire special legislation. Then followed by

5 *38 Studios* and now here.

6 Now, the legislature has -- this is just of

7 general interest, I think partially as a result of the

8 activity here in these kind of cases -- has changed the

9 law in Rhode Island so now Rhode Island follows what's

10 the majority statutory scheme which gives only pro

11 tanto relief to the non-settling defendants rather than

12 pro rata. Having said all of that, I'd ask your Honor

13 to award us our fees.

14 THE COURT: All right. Thank you, Mr. Wistow.

15 All right. Any comments from defendant counsel?

16 MR. HALPERIN: Your Honor, Mr. Halperin. I do

17 have a couple of comments, if I may?

18 THE COURT: Let's start with Mr. Halperin, yes.

19 MR. HALPERIN: Thank you.

20 Your Honor, on behalf of all of the Prospect

21 entities, we obviously are here in support of the

22 settlement that we've entered into and have nothing to

23 say other than to ask the Court to approve it as

24 quickly as is possible. And we certainly support the

25 notion that an order consistent with what we need for

1 think that has to be taken into consideration here.

2 We have filed declarations by Mr. Callaci, Ms.

3 Violet and Mr. Kasle who not only ask the Court to

4 approve the settlement itself, but affirmatively ask

5 the Court to approve our fee of 23 1/3 percent. Those

6 people represent -- those three individuals who I

7 mentioned represent over a thousand of the Plan

8 participants.

9 It should be noteworthy that not one single

10 participant that, as I understand it, has filed an

11 objection to anything, indeed, nobody has filed an

12 objection to anything with the exception of Mr. Merten

13 who has the technical objection that he wants to

14 preserve the situation with the special statute that

15 was passed; he wants to continue to say it's

16 unconstitutional. And we've offered that originally,

17 and we have no problem with that. With that caveat

18 that he's preserved that, the only remaining defendants

19 in the case have no objection.

20 Incidentally, what's interesting, I might point

21 out, is that on July 14th the Governor signed a

22 statute, signed legislation, that should have been done

23 years and years ago, doing away with these special

24 statutes that have been passed. This is the fourth one

25 I've been involved in. The *RISD* one, there was a

1 the plaintiffs to be able to draw on the letter of

2 credit is actually critical. There's very specific

3 language in the letters of credit that must be compiled

4 with. And it refers back to the settlement agreement

5 as Mr. Sheehan indicated.

6 It's no different than what your Honor already

7 approved back in September of 2019 with the earlier

8 settlement in which the Court made a finding that the

9 settlement was entered into in good faith and

10 determined to be fair, adequate and reasonable. The

11 only slight difference is our language in our

12 settlement refers to good faith under the Rhode Island

13 statute. That was the only distinction. I'm not sure

14 whether that's a distinction with meaning, but if the

15 Court is inclined to reference that, that would be

16 helpful. And we too have no issue with the reservation

17 that the Court also included in the previous settlement

18 that the issue of whether the settlement statute is

19 preempted by ERISA or is unconstitutional are preserved

20 for the future on behalf of the other litigants. So

21 that would resolve the issues with respect to getting

22 the monies flowing if the Court could focus on that.

23 With respect to the overall case, I certainly

24 share the sentiment that Mr. Wistow indicated that

25 there were a lot of factors that led to this

1 settlement. And it certainly was fiercely litigated,
2 there's no question about that. I do want to state for
3 the record that Mr. Wistow brought up the fact that the
4 Attorney General in a regulatory proceeding that really
5 has nothing directly to do with this case, ultimately
6 did approve the effective change of control that
7 Prospect was seeking with conditions, one of which is
8 that certain letters of credit be posted.

9 But what I would like to put on the record is
10 that in that same decision there was a finding that
11 Prospect had fully complied with the conditions that
12 were imposed back in 2014. And it were subsequent
13 events, transactions that Prospect entered into, that
14 led to the concern that there was a financial
15 instability and a need for these new conditions to
16 approve this new application. So I did not want that
17 to be unsaid.

18 Lastly, your Honor, I would like to publicly
19 thank Retired Chief Judge Frank Williams. Without his
20 efforts going between myself and Mr. Wistow and Mr.
21 Sheehan, there's no likelihood that we would be here
22 today. And I think he deserves a significant amount of
23 credit. I'd just like that noted for the record. And
24 with that, I thank the Court for the time.

25 THE COURT: Thank you, Mr. Halperin.

1 THE COURT: Okay. Very good.
2 Mr. Godofsky.

3 MR. GODOFSKY: Yes, your Honor. Thank you very
4 much.

5 So I would like to just emphasize the point that
6 Mr. Sheehan made about the complexity of this case and
7 the value of the settlement to the class. This case
8 was filed more than three years ago. We are still not
9 through the motion-to-dismiss phase. If it were not
10 for this settlement, we would face heated litigation
11 over novel issues involving pleading standards,
12 standing, class certification, fiduciary duty,
13 privilege, breach of duty, damages, church plan issues,
14 funding standards for church plans and successor
15 liability. Many of these issues are issues of first
16 impression or unsettled law or extremely unique factual
17 issues. If it were not for this settlement, plaintiff
18 class would be probably years away from getting any
19 money from any of the settling defendants, if any, and
20 if ever.

21 Given that, given the fact that this case has
22 been truly fiercely litigated and that it would not be
23 over were it not for the settlement, Angell's position
24 is that this settlement is a good settlement, it's a
25 fair settlement. And Angell would also like to request

1 MR. WISTOW: I was remiss in not thanking Judge
2 Williams also. I can tell you that he moves people.
3 He would call us up 2 o'clock in the morning and say,
4 Mr. Wistow, what's your answer to Mr. Halperin's latest
5 proposal? He would call on the weekend. And there's
6 no doubt that he played a vital role in the situation.
7 I'm sure he woke up Mr. Halperin from time to time.

8 THE COURT: Okay. Well, thank you. I know he
9 did a great job and I've spoken to him about it, and I
10 got an email from him. I know he had hoped to attend
11 this hearing actually but was caught up in another
12 mediation so he said he was unable to attend but made
13 himself available if there were any questions.

14 But let me ask, I know Mr. Merten was about to
15 say something so let me ask him.

16 MR. MERTEN: Very quickly, your Honor. Despite
17 how complex everything was and how bitter everything
18 was fought leading up to this point, there seems to be
19 complete agreement as to the motions before the Court
20 and the inclusion of the provision that the Court put
21 in its March 26th, 2021, order with respect to the
22 constitutionality paragraph 22, which is the only issue
23 that the Diocesan defendants raised. So we think the
24 path forward is probably pretty clear with respect to
25 the settlement and even the attorneys' fees.

1 a quick ruling on the fairness of the settlement. We
2 believe it's in everybody's interests for this to be
3 resolved quickly.

4 Thank you very much, your Honor. If you have
5 any questions for me, I'd be glad to answer them.

6 THE COURT: No, I don't have any specific
7 questions.

8 All right. Any others?

9 MR. CALLACI: Your Honor, may I be heard?

10 THE COURT: Sure. Mr. Callaci.

11 MR. CALLACI: Your Honor, my name came up when
12 Mr. Wistow was making some comments; thankfully not in
13 the pejorative. He did make note of the fact that I
14 submitted a declaration in this case. And while it
15 does speak for itself, I do want to say that I come
16 before you today standing by what I said in that
17 affidavit; offering the Union's unequivocal support for
18 the terms of the settlement, for the legal fees under
19 the engagement and fee agreement that's been approved
20 by the Court a long time ago.

21 I have the good fortune of representing nearly
22 400 union members who are among the 2700 participants
23 in this case. And they wanted me to go on the record
24 today to also say that they are grateful that there
25 have to date been no cuts to the benefit. They are

1 grateful for the brilliant work that has been done by
2 the Plan Receiver, Mr. DeI Sesto, the Special Counsel,
3 Mr. Wistow, Mr. Sheehan, Mr. Ledsham. And they have
4 all kept, at least the folks I represent, fully
5 informed over the course of this litigation, which is
6 not an easy thing to do but it's a critical and
7 important thing to do because when you are worried
8 about your income security when you're on a fixed
9 income, when you are retired, at the very least knowing
10 what's going on in the case and being fully informed;
11 it lends some calm to an otherwise un-calm and
12 nerve-racking situation.

13 And I wanted it to be clear that the folks I
14 represent are grateful for the work that has been done
15 so far and for the steady hand of the Court. Thank
16 you.

17 THE COURT: Thank you. All right.

18 Any other -- yes, Mr. Hemmendinger.

19 MR. HEMMENDINGER: Sorry, your Honor. I don't
20 have anything specific to add to what other counsel
21 have said on both sides in support of the settlement,
22 but I particularly agree with what Mr. Sheehan and Mr.
23 Wistow have said about the merits of the settlement,
24 the benefits of the settlement and the work that was
25 done to achieve it. Thank you.

1 with respect to the Diocesan defendants with respect to
2 their argument about the statute being preempted or
3 unconstitutional. So I'm going to ask plaintiffs'
4 counsel to prepare an order to that effect and also
5 approving the attorneys' fees in the amount in the
6 percentage requested.

7 Just by way of sort of general comments with
8 respect to this approval, I don't believe it
9 would -- as I've indicated earlier, that it's either
10 necessary, nor would it be all that much help to anyone
11 for me to write an opinion in this case. One of the
12 reasons I feel that way is not just its uniqueness, but
13 I think this is about the most well-supported and
14 thoroughly vetted settlement and request for attorneys'
15 fees that I've seen, and I've presided over a number of
16 class actions which have resulted in settlements. But
17 by the time it's gotten to me at this juncture, it has
18 essentially been vetted and approved by Judge Stern,
19 with a very thorough and well-reasoned and compelling
20 written opinion which has been referenced here. The
21 affidavit of Retired Chief Justice Williams, which is
22 also comprehensive and thorough and places the case and
23 the settlement and the attorneys' fees award in
24 context. The fact that the fee award was negotiated by
25 a very sophisticated receiver, Mr. DeI Sesto, who is as

1 THE COURT: Thank you.

2 MS. VIOLET: Your Honor, could I be heard?

3 THE COURT: Who is that?

4 MS. VIOLET: Arlene Violet, your Honor.

5 THE COURT: Oh, sure. Your name wasn't on
6 there, Ms. Violet. Go ahead.

7 MS. VIOLET: Your Honor, I just want to echo
8 Attorney Callaci's comments. My clients certainly
9 support 100 percent this settlement. And I also want
10 to comment on the absolute brilliance of the Wistow
11 firm, textbook legal work that they did, and the total
12 support of the fees that they are requesting. Thank
13 you, your Honor.

14 THE COURT: Thank you. All right. Anyone else?

15 Okay. Well, I thank you all for the
16 presentations and the comments. So I'm going to keep
17 my comments fairly brief on the record here. I would
18 like to have a written order prepared, but let me keep
19 it fairly simple.

20 I am going to approve -- grant final approval of
21 the settlement, certify the class, the class
22 representatives and counsel. And I'll also make the
23 finding requested with respect to good faith under
24 Rhode Island General Law Section 23-17.14 to 35. And
25 the order that will issue should note the reservation

1 experienced in these matters as anyone in the bar and
2 who I think negotiated a very good fee arrangement and
3 contract with the Special Counsel on behalf of the
4 members -- on behalf of the receivership I should say.
5 And it comes to me not only with all of that support
6 but now, as we've just heard on the record, the support
7 in the affidavits of Mr. Callaci and Ms. Violet and
8 Mr. Kasle on behalf of the individual members of the
9 Plan who are the ultimate beneficiaries of this
10 settlement when the money is paid. And all of that in
11 combination just overwhelmingly suggests to me that the
12 settlement is fair and reasonable and for the benefit
13 of all of these members.

14 In addition to that, the percentage strikes me
15 as more than reasonable I think that in the
16 circuit -- the cases have been cited. I've commented
17 on this in prior decisions, but the percentage-of-fund
18 method has been adopted and approved by the First
19 Circuit and in the district courts. And I think the
20 actual percentage here, the 23 1/2, is well within the
21 usual percentages that are approved. It's been noted
22 that those are typically between 20 and 30 percent. In
23 my experience, they're sometimes over 30 percent. So I
24 think that 23 1/2 percent that was negotiated here is
25 more than reasonable.

1 And that's especially true in light of the
 2 complexity of what -- complexity of this case. It is
 3 among the certainly top three or four of most complex
 4 cases that I have been involved in, although my
 5 own -- I will say very thankfully that most of the
 6 complexity has been dealt with on your side of the
 7 screen and not on my side of the screen and maybe in
 8 Judge Stern's court. I think we have -- on this side
 9 we've skated a little bit free of the rancor and the
 10 -- maybe not all the rancor, but a lot of it and some
 11 of the complexity.

12 I think Mr. Wistow mentioned the *Loestrin* case.
 13 I don't see anybody on this screen who was involved in
 14 that case, but don't underestimate the *Loestrin* case.
 15 There were 25 testifying experts and 50 substantive
 16 motions in limine and settled right after I impaneled
 17 the jury and just before opening statements. And it
 18 was, I think, a \$300 million settlement, if my
 19 recollection serves me correctly, in an antitrust class
 20 action, multidistrict litigation case. So I put this
 21 maybe in that same league.

22 So when I look to the 23 1/3 percent, and just
 23 by my own experience comparing it to some other cases
 24 where certainly higher percentages have been approved
 25 for equal or lesser intensity of work, I will say that

1
 2 I, Lisa Schwam, CRR-RPR-RMR, do hereby
 3 certify that the foregoing transcript is a correct
 4 transcript of a remote video conference prepared to the
 5 best of my skill, knowledge and ability of the
 6 proceedings in the above-entitled matter.
 7

8 /s/ Lisa Schwam

9 Lisa Schwam, CRR-RPR-RMR
 10 Federal Official Reporter

Date:
 August 3, 2021

1 I think that Mr. Wistow and Mr. Sheehan and their firm
 2 have -- did some really exceptional lawyering and very
 3 creative and very tenacious so I have no trouble
 4 approving that fee award.

5 So I don't think it really is necessary for me
 6 to say too much more than that. I would just ask you
 7 to prepare a written order and circulate that order
 8 before submitting it to other counsel for any comment.
 9 And then once you submit it to me, I will review it and
 10 make any changes I think are necessary and I'll get
 11 that executed. And I think that will get you on your
 12 way to getting these funds distributed.

13 MR. WISTOW: Thank you, your Honor.

14 THE COURT: All right. So is there anything
 15 else before we sign off?

16 MR. WISTOW: I guess I have to give you some bad
 17 news. We may be back in front of you with the
 18 remaining defendants.

19 THE COURT: Yes. I figured that we would be
 20 setting something up. Maybe we can go off the record
 21 for just a moment before we adjourn just so that we
 22 don't bother the court reporter with this, but what is
 23 your plan in terms of the rest of the case?

24 (Off-the-record discussion)

25 (Time noted; 3:25 p.m.)