Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 2/13/2023 3:28 PM
Envelope: 3984102
Reviewer: Victoria H

Hearing Date: February 15, 2023 @ 2:00 p.m.

STATE OF RHODE ISLAND PROVIDENCE, SC		SUPERIOR COURT
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC. v. ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, AS AMENDED	: : : : : : :	C.A. No.: PC-2017-3856
In re: CHARTERCARE COMMUNITY BOARD, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND and ROGER WILLIAMS HOSPITAL	: : : : : :	C.A. No.: PC-2019-11756

RECEIVER'S REPLY TO RHODE ISLAND ATTORNEY GENERAL'S RESPONSE TO THE PETITION TO PARTIALLY DISTRIBUTE CORPORA OF CERTAIN TRUSTS

Stephen F. Del Sesto, Esq., solely in his capacity as Receiver in the above-captioned cases, hereby replies to the Rhode Island Attorney General's Response to the Receiver's Petition to Partially Distribute Corpora of Certain Trusts ("Petition").

The Attorney General suggests that the Court should delay ruling on the Petition in order to seek additional information about whether PBGC will someday provide any coverage to the Plan. The answer to that question is presently unknowable and in any event irrelevant, for the reasons discussed below.

The Attorney General's Response proceeds from two fundamentally incorrect premises.

First, there is <u>no</u> possible scenario in which any rights to payment under the Subject Trusts (whether of income or corpora) could be diverted to any entity other than the Plan or PBGC. If PBGC ultimately provides coverage, then, by operation of federal law, PBGC will step into the shoes of the Plan and acquire the Plan's rights to receive any future distributions from the Subject Trusts. See Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 637 (1990) ("When a plan covered under Title IV terminates with insufficient assets to satisfy its pension obligations to the employees, the PBGC becomes trustee of the plan, taking over the plan's assets and liabilities."). Of course, the Receiver's rights in the Subject Trusts are clearly assets of the Plan. Under federal law,[1] as explicated by the U.S. Supreme Court, those rights would thereafter belong to PBGC.

Second, the Attorney General's Response puts the cart before the horse. Because of all the same "issues of first impression" to which the Attorney General alludes, see Attorney General's Response at 3, PBGC's determination of whether, when, and by what percentage it might eventually provide coverage to the Plan could ultimately depend (at least in part) on the magnitude of the Plan's shortfall.

To that end, both PBGC and the Receiver have entered into a Common Interest Agreement and Acknowledgment, which states in relevant part:

> WHEREAS **if** the Plan is covered by Title IV of ERISA and is terminated without sufficient assets to pay benefits, at some time in the future, PBGC **may** become statutory trustee of the Plan, take over the Plan's assets and pay guaranteed benefits to plan participants, **subject to statutory limitations**, and in accordance with Title IV of ERISA and regulations;
>
> WHEREAS the Receiver and PBGC therefore share common interests in the prosecution of claims against third parties to recover funds for the Plan by trial or settlement **and thereby reduce the extent to which the Plan is underfunded**;
>
> [Emphasis Supplied]

Exhibit 1 (Common Interest Agreement and Acknowledgment) at 1. It further states:

[1] Federal law is of course controlling under the Supremacy Clause, U.S. Const. art. VI, cl. 2.

> **This Agreement is not an acknowledgement or admission that the Plan is entitled to coverage** under Title IV and is without prejudice to any rights PBGC has under ERISA and by regulation with respect to the Plan.
>
> [Emphasis supplied]

Id. at 2. These provisions are consistent with PBGC's past statements to the Receiver:

> Even if the Plan were found to be covered by ERISA, including Title IV of ERISA, the Plan administrator remains responsible for administering the Plan – including decisions with regard to collecting amounts owed to the Plan and pursuing suits on behalf of the Plan. The Plan administrator **must** continue to act for the Plan unless and until the Plan is terminated under Title IV and PBGC is appointed its statutory trustee. For your information, **when PBGC does become trustee of a terminated plan, it succeeds to a plan's claims** and causes of action, including any ongoing litigation. . . . .
>
> [Emphasis supplied]

Exhibit 2 (May 15, 2019 letter of Charles L. Finke to Stephen Del Sesto).

Logically, the smaller the shortfall becomes, the more likely PBGC will be to provide coverage (i.e. to assume the obligation of paying the shortfall). Thus, failing to grant the Petition could, perversely, help bring about the very denial of coverage—in whole or in part—that would render the relief sought in the Petition the most critical.

Here, the Plan and its beneficiaries are confronted with four possible scenarios. Under none of them is there any reason to delay or deny the instant Petition.

Scenario #1: PBGC provides no coverage. In this scenario, absent payment of the lump sums sought by the instant Petition, the Plan will run out of funds before the Settlors' purposes (as set forth in the Petition) can be accomplished. PBGC would receive no financial benefit from the Subject Trusts, but neither would the pensioners, after the Plan has run dry. Any future income from the Subject Trusts would be eaten up by administrative expenses before such income could be distributed to the pensioners. A lump-sum distribution in this situation enables payments to pensioners for a longer period of time, with no concomitant increase of administrative expense.

Scenario #2: PBGC provides partial coverage, i.e. covers more than 0% but less than 100% of the Plan benefits earned by pensioners. In this scenario, there will still be a shortfall. PBGC would eventually terminate the Plan, and some benefits would go unpaid. PBGC, however, would acquire the Plan's rights to receive the distributions from the Subject Trusts (which none of the Subject Trusts grant any discretion to the trustee to divert). See LTV Corp., *supra*. PBGC could seek to pool future distributions from the Subject Trusts with other terminated plans' assets and apply them to payment of all pensioners of all terminated single-employer retirement plans nationwide. See 29 U.S.C. § 1342(a) ("Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter."). Because PBGC would only provide partial coverage in this scenario, the Plan would not receive the full benefit of the Subject Trusts.

Scenario #3: PBGC provides 100% coverage. In this scenario, the Plan's pension benefits would be covered in full. However, PBGC will terminate the Plan and acquire all of the Plan's assets and rights as of the time of termination. Obviously, this would include (if the Petition is denied) the rights to future distributions under the Subject Trusts; or (if the Petition is granted) the moneys in the Plan including the lump sums. See LTV Corp., *supra*.

Scenario #4: PBGC delays any decision indefinitely. This scenario is functionally indistinguishable from the scenario in which PBGC simply denies coverage. In this scenario, absent payment of the lump sums sought by the instant Petition, the Plan will run dry sooner rather than later. The Plan would face the same problems as in Scenario #1.

Under none of these scenarios does it assist the Court's analysis in any way to try to predict PBGC's determination as to Plan coverage. If PBGC is riding to the pensioners' rescue, PBGC will take the distributions from the Subject Trusts either in a lump sum or over time. If PBGC is not riding to the pensioners' rescue, then the pensioners desperately need the lump sums from the Subject Trusts now. Any delay in granting the Petition helps no one and does not advance the intent of the settlors in any way. And as addressed in the Petition and in reply to Bank of America, the interests of the co-beneficiaries of the Subject Trusts will be completely uninjured by granting the Petition.

Respectfully submitted,

Stephen F. Del Sesto, Esq. (#6336),
Solely in His Capacities as Permanent Plan Receiver of the St. Joseph Health Services of Rhode Island Retirement Plan, and as Permanent Liquidating Receiver of St. Joseph Health Services of Rhode Island, Roger Williams Hospital, and CharterCARE Community Board,

By his Attorneys,

/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; (401) 272-9752 (fax)
mwistow@wistbar.com
spsheehan@wistbar.com
bledsham@wistbar.com

Dated: February 13, 2023

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 2/13/2023 3:28 PM
Envelope: 3984102
Reviewer: Victoria H

CERTIFICATE OF SERVICE

I hereby certify that, on the 13th day of February, 2023, I filed and served the foregoing document through the electronic filing system on the following users of record:

Stephen F. Del Sesto, Esq.
Pierce Atwood LLP
One Financial Plaza, 26th Floor
Providence, RI 02903
sdelsesto@pierceatwood.com

Maria R. Lenz, Esq.
Julie Harvey, Esq.
Sarah Rice, Esq.
Office of the Attorney General
150 South Main Street
Providence, RI 02903
mlenz@riag.ri.gov
jharvey@riag.ri.gov
SRice@riag.ri.gov

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

Christopher Callaci, Esq.
United Nurses & Allied Professionals
375 Branch Avenue
Providence, RI 02903
ccallaci@unap.org

Arlene Violet, Esq.
499 County Road
Barrington, RI 02806
genvio@aol.com

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

Elizabeth Wiens, Esq.
Gursky Wiens Attorneys at Law
1130 Ten Rod Road, Suite C207
North Kingstown, RI 02852
ewiens@rilaborlaw.com

Jeffrey W. Kasle, Esq.
Olenn & Penza
530 Greenwich Avenue
Warwick, RI 02886
jwk@olenn-penza.com

George E. Lieberman, Esq.
Gianfrancesco & Friedmann
214 Broadway
Providence, RI 02903
george@gianfrancescolaw.com

Howard Merten, Esq.
Partridge Snow & Hahn LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
hm@psh.com

Stephen Morris, Esq.
Rhode Island Department of Health
3 Capitol Hill
Providence, RI 02908
stephen.morris@ohhs.ri.gov

William M. Dolan, III, Esq.
Adler Pollock & Sheehan P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903-1345
wdolan@apslaw.com

Ekwan Rhow, Esq.
Bird, Marella, Boxer, Wolpert, Nessim,
Drooks, Licenberg & Rhow, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, CA 90067-2561
erhow@birdmarella.com

Preston Halperin, Esq.
Christopher J. Fragomeni, Esq.
Dean J. Wagner, Esq.
Savage Law Partners
564 South Water Street
Providence, RI 02903
phalperin@shslawfirm.com
chris@savagelawpartners.com
dwagner@savagelawpartners.com

Thomas S. Hemmendinger, Esq.
Sean J. Clough, Esq.
Lisa M. Kresge, Esq.
Ronald F. Cascione, Esq.
Brennan Recupero Cascione Scungio McAllister LLP
362 Broadway
Providence, RI 02909
themmendinger@brcsm.com
sclough@brcsm.com
lkresge@brcsm.com
rcascione@brcsm.com

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

Ryan M. Gainor, Esq.
Hinckley, Allen & Snyder LLP
100 Westminster Street, Suite 1500
Providence, RI 02903
rgainor@hinckleyallen.com

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Benjamin Ledsham

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 2/13/2023 3:28 PM
Envelope: 3984102
Reviewer: Victoria H

Exhibit 1

COMMON INTEREST AGREEMENT AND ACKNOWLEDGMENT

This Common Interest Agreement and Acknowledgement (the "Agreement") is entered into as of February 8, 2023, between Stephen Del Sesto, Esq. (the "Receiver"), solely in his capacity as the Permanent Receiver and Plan Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), and the Pension Benefit Guaranty Corporation ("PBGC") (hereinafter referred to individually as "Party" and collectively, the "Parties").

WHEREAS the Receiver is charged with asserting and prosecuting claims to recover funds for the Plan, which is significantly underfunded;

WHEREAS PBGC is a wholly owned United States government corporation that administers the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and regulations thereunder. PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV of ERISA;

WHEREAS if the Plan is covered by Title IV of ERISA and is terminated without sufficient assets to pay benefits, at some time in the future, PBGC may become statutory trustee of the Plan, take over the Plan's assets and pay guaranteed benefits to plan participants, subject to statutory limitations, and in accordance with Title IV of ERISA and regulations;

WHEREAS the Receiver and PBGC therefore share common interests in the prosecution of claims against third parties to recover funds for the Plan by trial or settlement and thereby reduce the extent to which the Plan is underfunded; and

WHEREAS pursuant to and in furtherance of those shared interests, attorneys for PBGC and the Receiver have had in the past, and intend to continue to have in the future, communications and to share information concerning possible settlement and prosecution of such claims against third parties ("Common Interest Materials"),

NOW IT IS HEREBY AGREED AND ACKNOWLEDGED that the purpose of this Agreement is to ensure that the exchanges and disclosures of Common Interest Materials do not diminish in any way the confidentiality of such information or constitute a waiver of any privilege or immunity otherwise available. The Parties intend to preserve the confidentiality of, and all applicable privileges and other legal protections with respect to, any Common Interest Materials exchanged pursuant to this Agreement.

The Parties will take appropriate steps to protect the privileged and confidential nature of any and all Common Interest Materials. Those steps include, without limitation, labeling "Privileged" or "Common Interest Material" any material that the disclosing party believes consists of Common Interest Materials.

In the event that any Party to this Agreement is requested or required to disclose any Common Interest Materials, the Party shall assert all applicable privileges, including, but not limited to, the common interest doctrine. With respect to any Freedom of Information Act request, PBGC shall promptly inform the Receiver of the request or requirement to disclose, so as to afford the Receiver the opportunity to oppose or seek protection from the compelled disclosure.

This Agreement is not an acknowledgement or admission that the Plan is entitled to coverage under Title IV and is without prejudice to any rights PBGC has under ERISA and by regulation with respect to the Plan.

PENSION BENEFIT GUARANTY CORPORATION

By: Craig Fessenden, Deputy General Counsel
Dated: Febraruy 8, 2023

____________________, Receiver
Stephen Del Sesto, Esq., solely in his capacity as Receiver
of the St. Joseph Health Services of Rhode Island Retirement Plan
Dated: February 8, 2023

Exhibit 2

PBGC
Protecting America's Pensions

Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

Stephen Del Sesto
Pierce Atwood LLP
One Financial Plaza, 26th Floor
Providence, Rhode Island 02903

MAY 15 2019

Re: St. Joseph Health Services of Rhode Island Retirement Plan

Dear Mr. Del Sesto:

I am writing in response to your letter dated May 14, 2019, regarding the St. Joseph Health Services of Rhode Island Retirement Plan ("Plan").

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States government corporation and agency established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. §§ 1301 – 1461. We understand that you submitted, with respect to the Plan, a 2017 Form 5500 and attached to that Form 5500 an IRC §410(d) Election statement. PBGC is reviewing the §410(d) Election.

Even if the Plan were found to be covered by ERISA, including Title IV of ERISA, the Plan administrator remains responsible for administering the Plan – including decisions with regard to collecting amounts owed to the Plan and pursuing suits on behalf of the Plan. The Plan administrator must continue to act for the Plan unless and until the Plan is terminated under Title IV and PBGC is appointed its statutory trustee. For your information, when PBGC does become trustee of a terminated plan, it succeeds to a plan's claims and causes of action, including any ongoing litigation. And PBGC may bring litigation on behalf of a terminated plan for at least three years after the date PBGC becomes trustee. 29 U.S.C. § 1303(e)(6)(B)(ii).

Thank you.

Respectfully,

Charles L. Finke
Deputy General Counsel
(202) 326-4400, ext. 3588

cc: Jeffrey B. Cohen, Esq.
Max Wistow, Esq.