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 FINAL APPROVAL MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES IN CONNECTION WITH "SETTLEMENT B"

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

August 15, 2019

TABLE OF CONTENTS

The law firm of Wistow, Sheehan & Loveley, P.C. ("Plaintiffs' Counsel"[1] or "WSL") submits this memorandum in support of its motion for an award of attorneys' fees for their representation of the named plaintiffs and the putative class members in connection with the proposed settlement ("Settlement B") between Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) ("the Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs (the "Named Plaintiffs") and on behalf[2] of all class members as defined herein (collectively "Plaintiffs"), and Defendants CharterCARE Foundation ("CCF"), CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (collectively the "Settling Defendants") (Plaintiffs and the Settling Defendants are referred to collectively as the "Settling Parties").[3]

PROCEDURAL BACKGROUND

I. This lawsuit

On May 17, 2019 the Court issued a Memorandum and Order ("Settlement B Memorandum and Order") (Dkt #123) which *inter alia* (and preliminarily) certified a

---

[1] On May 17, 2019, the Court preliminarily appointed WSL as class counsel on behalf of the preliminarily certified class. See Dkt #123 (Memorandum and Order) at 9.

[2] On May 17, 2019, the Court preliminarily certified the settlement class and preliminarily appointed the Named Plaintiffs as class representatives. See Dkt #123 (Memorandum and Order) at 9.

[3] Defendants SJHSRI, RWH, and CCCB are also parties to the proposed settlement between Plaintiffs and Defendant CCF. However, SJHSRI, RWH, and CCCB are not making any monetary contribution to *this* settlement. Instead, they are participating solely for the purposes of releasing Defendant CCF from any liability and disclaiming any rights they may have in Defendant CCF. In addition, although not a party to the settlement agreement, Defendant The Rhode Island Community Foundation will be released from liability and dismissed from the case in connection with the proposed settlement, since its only role was as custodian for Defendant CCF's investment assets.

settlement class, appointed Plaintiffs' Counsel as settlement class counsel, and approved Settlement B. The Court scheduled a final approval hearing on Settlement B for August 29, 2019, to address both the merits of the settlement and WSL's application for attorneys' fees,[4] and the Court granted the Settling Parties leave to file papers in support of final settlement approval.[5]

This is the second proposed partial settlement in this matter but the first to be scheduled for final Court approval. On November 21, 2018, Plaintiffs and Defendants SJHSRI, RWH, and CCCB filed their Joint Motion for Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval, concerning a proposed settlement between them ("Settlement A") (Dkt #63). At the same time, Plaintiffs' Counsel filed a Motion for Attorneys' Fees in connection with that proposed settlement (Dkt #64), and the Declaration of Max Wistow dated November 21, 2018 (Dkt #65) ("Wistow Dec."). In further support of their motion, Plaintiffs' Counsel filed the Supplemental Declaration of Max Wistow dated January 4, 2019 (Dkt #79) ("Wistow Supp. Dec."). Plaintiffs' Counsel also rely upon both declarations in support of their motion for attorneys' fees in connection with Settlement B.

---

[4] See Dkt #123 (Memorandum and Order) at 11 ("On August 29, 2019, at 10:00 a.m. in Courtroom 3 of the United States District Court for the District of Rhode Island, One Exchange Terrace, Providence, Rhode Island, or at such other date and time later set by Court order, this Court will hold a final approval hearing on the fairness, adequacy, and reasonableness of the Settlement Agreement to determine whether (i) final approval of settlement as embodied by the Settlement Agreement should be granted, and (ii) Plaintiffs' counsel's application for attorneys' fees for representing the settlement class should be granted, and if so, in what amount.").

[5] See Dkt #123 (Memorandum and Order) at 12 ("No later than August 15, 2019, which is fourteen (14) days prior to the final approval hearing, Plaintiffs must file papers in support of final class action approval of the Settlement Agreement and respond to any written objections [by members of the Settlement Class].").

On June 6, 2019 the Court issued a Memorandum and Order ("Settlement A Memorandum and Order") (Dkt #124) which *inter alia* scheduled a final approval hearing on Settlement A for September 10, 2019. The Settlement A Memorandum and Order granted the Non-Settling Defendants' motion for discovery involving that settlement.[6] Specifically, the Court allowed "narrowly tailored" discovery "concerning whether Settlement A was executed in good faith and is not collusive in accordance with Rule 23 of the Federal Rules of Civil Procedure and R.I. Gen. Laws § 23-17.14-35."[7] However, the Non-Settling Defendants did not seek such discovery in connection with Settlement B, and no such discovery was conducted.

II. In the Rhode Island Superior Court

There are two related active[8] proceedings pending in the Rhode Island Superior Court before the Honorable Brian P. Stern. The St. Joseph Health Services of Rhode Island Retirement Plan ("the Plan") is in receivership in the matter captioned St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, as amended, PC-2017-3856 (the "Receivership Proceeding"). Plaintiff Stephen Del Sesto has been appointed Receiver for the Plan in that case. In October

[6] All discovery is otherwise in abeyance under Fed. R. Civ. P. 26(d) & (f).

[7] See Dkt #103 (Prospect Entities' Motion for Leave to Propound Limited Discovery Relating to Settlement Between Plaintiffs and CharterCARE Community Board); Dkt #124 (Memorandum and Order) (granting Dkt #103).

[8] In addition to the two active proceedings, Plaintiffs at the same time this action was commenced filed a companion case in the Superior Court to protect their state law claims from the statute of limitations in the event this action is dismissed and the Court declines to exercise supplemental jurisdiction over the remaining state law claims, which has been stayed pending the resolution of this case. Moreover, CCCB has filed a Rhode Island Superior Court action captioned CharterCARE Community Board v. Samuel Lee, et al., PC-2019-3654. That action is also presently stayed pursuant to a Stipulation and Consent Order dated April 25, 2019.

2017 and with the express approval of the Superior Court, the Receiver retained WSL as Special Counsel to the Receiver.

In the role as Special Counsel to the Receiver, WSL issued subpoenas *duces tecum* to the following entities:[9]

- Adler Pollock & Sheehan, P.C.
- Bank of America, N.A.
- Defendant CharterCARE Community Board
- Defendant CharterCARE Foundation
- RI Department of Health
- Ferrucci Russo, P.C.
- Office of the Rhode Island Attorney General
- Defendant Prospect CharterCare, LLC
- Defendant Prospect Medical Holdings, Inc.
- Defendant The Rhode Island Community Foundation
- Defendant Roman Catholic Bishop of Providence
- Defendant SJHRSI (two subpoenas)

By agreement, or in acknowledgment of their legal obligation, several of the subpoenaed entities that are Defendants in this case produced documents in the possession and control of other entities that are also Defendants in this case.[10] Defendant Prospect Medical Holdings, Inc. also produced documents on behalf of Defendant Prospect East Holdings, Inc. ("Prospect East"), while Defendant Prospect CharterCare, LLC ("Prospect Chartercare") also produced documents on behalf of

[9] Dkt #65 (Wistow Dec.) ¶ 11.

[10] Dkt #65 (Wistow Dec.) ¶ 12.

Defendant Prospect CharterCare SJHSRI, LLC and Defendant Prospect CharterCare RWMC, LLC (collectively the "Prospect Defendants" or "Prospect Entities"); and Defendant Roman Catholic Bishop of Providence also produced documents on behalf of Defendants Diocesan Administration Corporation and Defendant Diocesan Service Corporation (collectively the "Diocesan Defendants").[11] In addition, Defendant The Angell Pension Group, Inc. ("Angell") eventually produced copies of its files in compliance with the Superior Court order appointing the Receiver, for which no subpoena was required.[12]

In most instances the subpoenaed parties did not produce the requested documents either promptly or completely, with the result that Special Counsel filed numerous discovery motions, all of which either were granted by the Superior Court or resulted in production of the requested documents prior to the granting of the motion.[13]

This discovery entailed the production of over 1,000,000 pages of documents which were obtained and reviewed by Special Counsel over an eight-month period prior to the commencement of this action.[14] In total, Special Counsel devoted over 1,470 hours of attorney time to this pre-suit investigation.[15]

The second related litigation that is active in the Rhode Island Superior Court is entitled *In re: CHARTERCARE HEALTH PARTNERS FOUNDATION, ROGER WILLIAMS HOSPITAL and ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND*,

---

[11] Dkt #65 (Wistow Dec.) ¶ 12.

[12] Dkt #65 (Wistow Dec.) ¶ 12.

[13] Dkt #65 (Wistow Dec.) ¶¶ 14-15.

[14] Dkt #65 (Wistow Dec.) ¶ 16.

[15] Dkt #65 (Wistow Dec.) ¶ 18.

C.A. No. KM-2015-0035 (the "2015 *Cy Pres* Proceeding"). Plaintiffs sought leave to intervene to assert claims against CCF in that proceeding on June 18, 2018, at the same time as the complaint was filed commencing this action.

The Receiver and Named Plaintiffs' claims against CCF in the 2015 *Cy Pres* Proceeding arose from the 2015 transfer by SJHSRI and RWH to CCF of approximately $8,200,000 of their charitable assets (the "*Cy Pres* Transfer"). Plaintiffs allege that the *Cy Pres* Transfer was a fraudulent transfer in violation of R.I. Gen. Laws §§ 6-16-4(a)(1), 6-16-4(a)(2) and/or 6-16-5(a). Plaintiffs also allege that, because the *Cy Pres* Transfer took place in connection with the anticipated dissolution of Defendants SJHSRI and RWH, the provisions of R.I. Gen. Laws §§ 7-6-51 & 7-6-61(c)(1) entitled creditors such as Plaintiffs to be paid before any funds could be transferred pursuant to the doctrine of *cy pres*. Settlement B was negotiated after the Rhode Island Superior Court granted Plaintiffs' motion to intervene in the 2015 *Cy Pres* Proceeding, by bench decision on September 17, 2018 and order entered on October 2, 2018.[16]

FACTUAL BACKGROUND

The factual background of Plaintiffs' claims against CCF is outlined in Plaintiffs' Final Approval Memorandum that is served and filed herewith, and is not repeated here.

WSL'S PROPOSED FEE AWARD

I. Proposed Fee Award

In connection with Settlement B, Plaintiffs' Counsel are seeking an award of attorneys' fees of 23.33% of the gross settlement amount of $4,500,000, totaling

[16] Dkt #79 (Wistow Supp. Dec.) ¶¶ 3-4, Exhibits 1 & 2.

$1,049,850, minus a $552,281.25 credit under the terms discussed below. This percentage is based upon the Retainer Agreement between Plaintiffs' Counsel and the Receiver that was approved by the Rhode Island Superior Court in the Receivership Proceeding prior to the commencement of this lawsuit, which provides *inter alia* that Plaintiffs' Counsel shall be entitled to a contingent fee of 23.33% of the gross settlement amount obtained by settlement after the commencement of litigation.[17]

As discussed below, in addition to approving WSL's fee at the outset of WSL's representation of the Receiver, the Rhode Island Superior Court in the Receivership Proceeding held a hearing after Settlement B was entered into by the Settling Parties, in connection with approving Settlement B. At that hearing the Superior Court again approved WSL's fee, stating that the proposed award of attorneys' fees of $1,049,850 in connection with Settlement B is "fair, reasonable, and very much a benefit to the receivership estate."[18]

It should be noted that in connection with their fee application involving Settlement A, and notwithstanding that they had no obligation to do so,[19] Plaintiffs' Counsel on their own volition agreed to reduce that fee application by $552,281.25, the amount that was paid to Plaintiffs' Counsel by the Receiver during the investigative phase. At that time it was anticipated that Plaintiffs' Counsel's fee application in

---

[17] Wistow Dec., Exhibit 3 ("If suit is brought, the 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.").

[18] Wistow Supp. Dec. ¶ 8, Exhibit 6 (Transcript of Hearing before Hon. Brian P. Stern on December 14, 2018) at 16.

[19] See Declaration of Stephen Del Sesto dated August 14, 2019 ("Del Sesto Dec.") ¶ 17 ("…I consider their [WSL's] offer to credit the hourly fees they received against their contingent fee to be a commendable and entirely voluntary contribution not required by the Retainer Agreement, but, rather, made out of concern for the Plan participants.").

connection with Settlement A would be heard and decided before Plaintiffs' Counsel's fee application in connection with Settlement B would be heard and decided. Instead, the final approval hearing for Settlement B is scheduled to precede the final approval hearing for Settlement A. Given that sequence, and if the Court prefers, Plaintiffs' Counsel have no objection to that reduction instead being applied to their fee application in connection with Settlement B, rather than to their fee application in connection with Settlement A.

II. Objections to Proposed Fee Award

All members of the settlement class have been sent the Class Notice which *inter alia* describes WSL's fee application and establishes a procedure for class members to object thereto. No one has specifically objected to WSL's fee application. Only one class member out of more than 2,700 has even objected to Settlement B.

The Diocesan Defendants are the only Non-Settling Defendants who have objected to WSL's fee application in connection with Settlement B, as of the date of the filing of this memorandum. As discussed below, the Diocesan Defendants lack standing to object to the fee application, have a vested interest in disincentivizing WSL from vigorously pursuing Plaintiffs' claims against them, and their objections are substantively without merit.

III. Attorney Time

As discussed below, WSL's fee application is based upon the percentage of the common fund approach, both because that is appropriate for recoveries such as this and because that is the method to which WSL and the Receiver agreed and the Rhode Island Superior Court approved in the Receivership Proceeding, at the outset of WSL's

involvement in this matter. However, WSL has also calculated its time devoted to representing the Receiver and/or the Named Plaintiffs.

During the investigative phase prior to filing suit, WSL devoted in excess of 1,472 hours.[20] Since filing suit, Plaintiffs' Counsel have devoted a minimum of an additional 2,600 hours of attorney time to the representation of the Receiver and/or the Named Plaintiffs in this and the related matters.[21]

ARGUMENT

I. The preferred method for determining the amount of attorneys' fees is the percentage of fund approach, with a benchmark of 25% of the gross recovery

Plaintiffs' Counsel has negotiated a proposed settlement that establishes a common fund to benefit all members of the Settlement Class. "Under the 'common fund' doctrine, a lawyer responsible for creating a common fund that benefits a group of litigants is entitled to a fee from the fund." 5 Newberg on Class Actions § 15:53 (5th ed.) (citation omitted). See Boeing Co. v. VanGemert, 444 U.S. 472, 478 (1980) ("[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.") (citations omitted).

The First Circuit recognizes two methods for calculating attorneys' fees in the class action context involving a common fund, the "percentage of the fund" ("POF") method, or the lodestar method. See In re Thirteen Appeals Arising Out of San Juan

---

[20] Dkt #65 (Wistow Dec.) ¶¶ 18 & 39.

[21] Second Supplemental Declaration of Max Wistow in Support of Approval of Settlements A and B and WSL's Fee Applications in Connection Therewith ("Wistow Second Supp. Dec.") dated August 15, 2019, at ¶ 6.

Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 307 (1st Cir. 1995) ("[W]e hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar."). The POF "method functions exactly as the name implies: the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." Thirteen Appeals, *supra*, 56 F.3d at 305.

The POF method is preferred in common fund cases. See In re Cabletron Systems, Inc. Securities Litigation, 239 F.R.D. 30, 37 (D.N.H. 2006) ("The POF method is preferred in common fund cases because 'it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.' This is something the lodestar method cannot do.") (quoting In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)) (internal quotations omitted). "In complex litigation—and common fund cases, by and large, tend to be complex— the POF approach is often less burdensome to administer than the lodestar method." Thirteen Appeals, *supra*, 56 F.3d at 307. "[U]sing the POF method in a common fund case enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency. Under the latter approach, attorneys not only have a monetary incentive to spend as many hours as possible (and bill for them) but also face a strong disincentive to early settlement. . . . If the POF method is utilized, a lawyer is still free to be inefficient or to drag her feet in pursuing settlement options—but, rather than being rewarded for this unproductive behavior, she will likely reduce her own return on hours expended." Id. Finally:

> Another point is worth making: because the POF technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote that "the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character." In fine, the market pays for the result achieved.

Id. (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)).

The benchmark percentage considered reasonable in the First Circuit is 25%. "Within the First Circuit, courts generally award fees 'in the range of 20-30%, with 25% as the benchmark.'" Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 349-350 (D. Mass 2015) (quoting Latorraca v. Centennial Techs., Inc., 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011) (collecting cases)), *aff'd*, Bezdek v. Vibram USA, Inc., 809 F.3d 78, 85 (1st Cir. 2015) (affirming allowance of attorneys' fees of 25% of the settlement). This benchmark is consistent with the empirical data concerning fee awards across the United States. See 5 Newberg on Class Actions § 15:83 (5th ed.) ("An earlier edition of the Treatise reported that (then-available) empirical studies showed that fee awards in class actions average around one-third of the recovery, a statement quoted by many courts. More recent empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20-30%, with the average award hovering around 25%. . . .").

Fee awards to class action plaintiffs' attorneys are essential to ensure access to the courts for large numbers of individuals who have suffered significant injuries that do not justify the great expense of litigation:

> Class action plaintiffs' attorneys provide an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent. Due to the expense, time and difficulty of pursuing complex

> litigation, it would likely not be economical for an individual Class Member to pursue such litigation on their own. *See Alpine Pharma., Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir.1973) ("In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation."); *In re Telectronics Pacing Sys. Inc.*, 137 F.Supp.2d 1029, 1043 (S.D.Ohio 2001) ("Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources."); *Mazola [v. May Dept. Stores Co., 1999 WL 1261312, at *4 (*D. Mass. Jan. 27, 1999) (Gertner, J.*)*] ("The litigation is critical, because it gives voice to relatively small claimants who may not be aware of statutory violations or have an avenue to relief.").

In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448, 463 (D.P.R. 2011). The class claims asserted in the case *sub judice* also would not have been brought if a class action were not possible, since the individual claims are too small to justify the enormous investment of time and resources required to assert those claims, especially in view of the complexity of the case and the number of parties involved.

The leading treatise on Class Actions also notes that the determination of what constitutes a fair and reasonable attorneys' fee should take into account the public policy in favor of incentivizing plaintiffs' counsel:

> Rule 23 of the Federal Rules of Civil Procedure provides that "[i]n 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." Courts that employ the percentage method must ensure that the particular percentage of the fund counsel seek, and the resulting fee, are reasonable. This section considers the ways in which courts might think about that question, while the succeeding sections canvas the rules that courts have adopted in doing so. Rule 23 requires that the fee award, and hence the percentage approved by courts utilizing the percentage method, be reasonable, but the Rule provides no measuring stick by which courts must make this assessment, nor does it explain in what way the fee should be reasonable. Reasonable compared to what?

> In analyzing this question, a good starting point would be to assume that the fee should further the goals underlying common fund litigation. Thus, one key purpose of the fee is to encourage lawyers to invest their own resources in pursuing small claims cases and hence to enable them, through organizing a practice around receipt of such fees, to operate as private attorneys general.

5 Newberg on Class Actions § 15:73 (5th ed.).

II. Plaintiffs' Counsel's fee application is fair and reasonable under the individual facts of this case

Under the POF method, "the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." Thirteen Appeals, *supra*, 56 F.3d at 305.

In the First Circuit, this determination is made on an individualized basis, case by case. In re Fidelity/Micron Securities Litigation, 167 F.3d 735, 737 (1st Cir. 1999) ("Moreover, because each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms.") (citation omitted). See 5 Newberg on Class Actions § 15:96 (5th ed.) ("The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis.") (citing In re Fidelity/Micron Securities Litigation, *supra*, 167 F.3d at 737).

The facts of this case, including the following specific facts, establish that WSL's fee application is fair and reasonable.

A. WSL's percentage fee was negotiated with the Receiver and approved by the Rhode Island Superior Court in connection with the Receivership Proceeding

What especially sets this case apart from other common fund cases and establishes the reasonableness of Plaintiffs' Counsel's proposed fee is the unique fact that this percentage was negotiated with the Receiver and approved by the Rhode Island Superior Court in connection with the Receivership Proceeding, both in advance of the filing of this case and again after Settlement B was concluded. In October 2017, when the Superior Court authorized the Receiver to enter into WSL's Retainer Agreement, the court was already familiar with the Plan and the interests of Plan participants. Since then the Superior Court's familiarity with the Plan and with WSL's representation deepened through the court's administration of the Plan in Receivership. Then, on December 14, 2018, after Settlement B was entered into, the Rhode Island Superior Court approved the actual proposed fee, when that court approved Settlement B:

> With respect to the settlement, the Court finds that the contingency fee being charged is, in fact, fair, reasonable, and very much a benefit to the receivership estate.[22]

Another reason to adhere to the percentage fee provided in the Retainer Agreement is that it is indisputable that the Named Plaintiffs and the Settlement Class have fully benefitted from Plaintiffs' Counsel's representation of the Receiver, both during the Investigative Phase and since. Indeed, it is impossible to separate the fruits of Plaintiffs' Counsel's labors on behalf of the Receiver from the benefits to be obtained by the Named Plaintiffs and the Class of Plan participants, or to allocate attorney time

[22] Dkt #79 (Wistow Supp. Dec.) ¶ 8, Exhibit 6 (Transcript of Hearing on December 14, 2018) at 16.

between Plaintiffs' Counsel's representation of the Receiver and Plaintiffs' Counsel's representation of the Settlement Class.

Thus, it is equally impossible to allocate any portion of Settlement B between the Settlement Class and the Receiver, so as to provide the basis to separately calculate Plaintiffs' Counsel's fee for representing the Receiver. Accordingly, WSL seeks an award of attorneys' fees for representing the Settlement Class that is inclusive of Plaintiffs' Counsel's fees for representing the Receiver.

An additional reason to adhere to the percentage fee provided in the Retainer Agreement is that the Receiver is essentially acting on behalf of the Settlement Class. The genesis and *raison d'etre* of the Complaint is the underfunded status of the Plan and the investigation undertaken on behalf of the Receiver. The Plan is in Receivership. The Receiver seeks recovery solely in his representative capacity, for the ultimate benefit of Plan participants. The Settlement provides that the Net Settlement Amount will be paid into the Plan, in accordance with the orders of the court in the Receivership Proceeding. In short, the interests of the Receivership Estate and the Settlement Class are identical. Thus, the Superior Court's conclusion "that the contingency fee being charged is, in fact, fair, reasonable, and very much a benefit to the receivership estate" is equally true as applied to the Settlement Class.

In determining the amount of WSL's fees, the Court "functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class." In re Fidelity/Micron Sec. Litig., *supra*, 167 F.3d at 736. The Receiver and the Superior Court have the same responsibility. Here, the Receiver, who is both a fiduciary and an officer of the Superior Court, negotiated the Receiver's Retainer Agreement, and the Superior

Court itself approved the agreement, both at the outset of litigation and twice again, first in connection with approving Settlement A and second in approving Settlement B. Both the Receiver and the Superior Court by definition were charged with ensuring that the fee was reasonable and not excessive. The Court should recognize Judge Stern's long experience in handling receiverships and ancillary litigation, which he could draw on to ensure that the fee he approved would be fair to the Plan and the Plan participants.

However, movants do *not* contend that, due to the Superior Court's involvement, this Court is obligated or even permitted to abdicate its duty to independently ascertain whether WSL's fee application is fair and reasonable. Movants also do *not* contend that, as a matter of law, state court determinations in parallel proceedings are necessarily entitled to deference in the adjudication of fee applications in federal court class actions. To the contrary, the significance of such rulings must be determined on an individualized, case by case basis. See In re Fidelity/Micron Securities Litigation, *supra*, 167 F.3d at 737 ("Moreover, because each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms.").

Movants *do* contend, however, that the role and actions of the Receiver and the Rhode Island Superior Court in approving WSL's proposed fee have a great deal of significance when weighing the specific facts of this case relevant to WSL's fee application.

B. No Settlement Class Member has objected to WSL's fee application and it has the affirmative support of nearly 1,000 Settlement Class Members

Another fact specific to this case that justifies WSL's fee application is that it has the affirmative support of the nearly 1,000 class members who are represented by counsel.[23] See Fickinger v. C.I. Planning Corp., 646 F. Supp. 622, 631 (E.D. Pa. 1986) ("[U]nanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight."). Moreover, the fact that only one member of the settlement class has objected[24] to the settlement, and none have objected to WSL's fee application, is further evidence that WSL's fee application is fair and reasonable. See Wallace v. Powell, 301 F.R.D. 144, 165 (E.D. Pa. 2014) ("'The absence of objections supports the reasonableness of the fee request.'") (quoting Frederick v. Range Resources–Appalachia, LLC, No. 08–288, 2011 WL 1045665, at *10 (W.D. Pa. Mar. 17, 2011)). See also In re Amer. Inv. Life Ins. Co. Annuity and Mktg. & Sales Practices Litig., 263 F.R.D. 226, 244 (E.D. Pa. 2009) ("The small number of objections and the objections' lack of merit indicate that the class is satisfied with the fee award").

C. WSL's fee has been agreed to by the parties

"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**." Fed. R.

---

[23] See Affidavit of Arlene Violet dated August 9, 2019 ("Violet Dec.") at 2 ("On behalf of these clients I urge the Court to approve the proposed settlements (including attorneys' fees) with the aforesaid entities."); Declaration of Christopher Callaci dated August 12, 2019 ("Callaci Dec.") at 2 ("I also add that the fee applications proposed by Plaintiffs' counsel in connection with Settlements A and B seem eminently fair and reasonable); Declaration of Jeffrey Kasle dated August 13, 2019 ("Kasle Dec.") at 1 ("In short, my clients fully support both settlements including the requested attorney's fees.").

[24] See Plaintiffs' separate Memorandum in Support of Motion for Final Approval at 26-27 (quoting and addressing the objection of the sole objecting class member, including its passing reference to attorney fees).

Civ. P. 23(h) (emphasis supplied). The Retainer Agreement constitutes both an advance determination of the reasonableness of Plaintiffs' Counsel's fee and memorializes the agreement between WSL, the Receiver, and the Superior Court. Here both the Superior Court and the Receiver are sophisticated and have a substantial interest in ensuring that WSL's fees are duly earned and not excessive.

Accordingly, their agreement is entitled to a presumption of reasonableness. See In re Cendant Corp. Litigation, 264 F.3d 201, 282 (3d Cir. 2001) ("[C]ourts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.") (citing Elliott J. Weiss and John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2105 (1995) ("[A] court might well feel confident in assuming that a fee arrangement an institutional investor had negotiated with its lawyers before initiating a class action maximized those lawyers' incentives to represent diligently the class's interests, reflected the deal a fully informed client would negotiate, and thus presumptively was reasonable.")); In re Carter's, Inc. Sec. Litig., No. 1:08-CV-2940-AT, 2012 WL 12877943, at *2 (N.D. Ga. May 31, 2012) (noting, as supporting fee award of 28%, that "[t]he request for attorneys' fees and reimbursement of litigation expenses has been reviewed and approved as fair and reasonable by Lead Plaintiff, a sophisticated institutional investor that was directly involved in the prosecution and resolution of the claims and who has a substantial interest in ensuring that any fees paid to Lead Counsel are duly earned and not excessive").

D. WSL's Fee is an appropriate incentive to Plaintiffs' Counsel

The Court may consider that Plaintiffs' Counsel is an experienced but nevertheless small firm, and it was clear from the outset that their undertaking of representing the Receiver and seeking class certification and representation would inevitably require them to decline undertaking other matters that they otherwise would have accepted, and, therefore, represent significant lost opportunity costs. Moreover, by agreeing to a contingent fee for representing the Receiver, Plaintiffs' Counsel relieved the Receiver (and, through the Receiver, the Plan) of the very substantial expense of legal fees in the event the claims were unsuccessful or the recoveries were so modest as to be insufficient to form the basis of a reasonable fee.

The Receiver both supports WSL's fee application and believes it would be detrimental to the Receivership Estate and to the Plan participants for WSL to be awarded fees that are less than the fees to which they would be entitled under the Retainer Agreement:

> It is important that Plaintiffs' Counsel have a strong financial incentive to pursue the claims in this litigation, which are legally and factually complex and extremely document-intensive, and span many decades of Plan administration. I believe the existing fee structure gives them that incentive, and their zealous prosecution of Plaintiffs' claims to date vindicates that belief. It would be detrimental to the Receivership Estate and the Plan participants for that financial incentive to be lessened, and for WSL to be awarded fees that are less than the fees to which they would be entitled under the Retainer Agreement. I also believe that the objections by the non-settling Defendants to WSL's fee applications are attempts to disincentivize Plaintiffs' Counsel from the vigorous pursuit of claims against them. Accordingly, I support their fee applications without any reservation whatsoever.[25]

---

[25] Del Sesto Dec. ¶ 18.

Through the Retainer Agreement, both the Receiver and the Superior Court determined what fee was necessary to sufficiently incentivize WSL and protect the interests of the Plan participants. The Non-Settling Defendants should not be permitted to upset that balance.

E. WSL's fee is especially reasonable given that this litigation is ongoing

As the Court is well aware, this litigation will continue against the Non-Settling Defendants even if the proposed partial settlements (Settlement B and Settlement A) are approved. The full scope of WSL's future investment in time and resources cannot be estimated at this time, other than it is highly likely that it will dwarf WSL's investment in time and resources to date. There will be no further attorneys' fees to be awarded in this case if Plaintiffs do not obtain any additional recoveries. Thus, WSL may invest many more thousands of hours to representing Plaintiffs but receive no additional fees. Under these circumstances, it is clearly unreasonable to measure the adequacy of WSL's fees solely against the time and resources already devoted to this case. On the other hand, if WSL in the future obtains additional recoveries from the Non-Settling Defendants, the reasonableness of WSL's fee can and will have to be determined at that time, and the Court at that time may consider the significance if any to be accorded to WSL's prior receipt of fees in connection with Proposed Settlements A and B.

In short, under the specific circumstances of this case, WSL's fee application is both fair and reasonable.

III. WSL's fee application is also fair and reasonable under the *ex ante* method, the market-mimicking approach, and the multifactor test

As noted, in the First Circuit the determination of whether a proposed fee is fair and reasonable is made on an individualized, case-by-case basis, without the requirement that any particular set of factors be considered. As previously discussed, WSL's fee application is fair and reasonable under that approach, based upon the specific facts of this case.

WSL's fee application is also fair and reasonable applying the other standards courts have utilized to make that determination. Although there apparently has been no occasion in the First Circuit to address it, the reasonableness of attorneys' fees is also sometimes determined through negotiating the fee at the outset of the representation, *ex ante*. See 5 Newberg on Class Actions § 15:7 (5th ed.). Moreover, some District Courts in the First Circuit have employed a market-mimicking approach that seeks to predict the fee would have been if it were determined in advance of the representation, and other courts in the First Circuit have employed a multifactor test. 5 Newberg on Class Actions § 15:96 (5th ed.) ("District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits[26] and at other times have employed the Seventh Circuit's market mimicking approach.[27]").

We submit that, in addition to WSL's fee application being fair and reasonable under the specific facts of this case, as discussed above, the roles of the Receiver and

---

[26] Citing Walsh v. Popular, Inc., 839 F. Supp. 2d 476, 483 (D.P.R. 2012); In re Tyco Intern., Ltd. Multidistrict Litigation, 535 F. Supp. 2d 249, 265–66 (D.N.H. 2007); In re Relafen Antitrust Litigation, 231 F.R.D. 52, 79 (D. Mass. 2005); In re Lupron Mktg. & Sales Practices Litig., No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005).

[27] Citing In re Cabletron Systems, Inc. Securities Litigation, 239 F.R.D. 30, 41 (D.N.H. 2006) and Nilsen v. York County, 400 F. Supp. 2d 266, 278-79 (D. Me. 2005).

the Superior Court in approving the Retainer Agreement demonstrate that the fee was reasonably determined *ex ante*. Moreover, WSL's fee application is also reasonable under both the market-mimicking approach and the multifactor approach.

A. WSL's fee application is appropriate under the *ex ante* method

The *ex ante* method involves a judicial determination of an appropriate fee prior to the commencement of litigation.

The Seventh Circuit, which instructs trial judges to set fees to mimic market rates, has summarized the *ex ante* approach as follows:

> [A] district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins. . . . Many district judges have begun to follow the private model by setting fee schedules at the outset of class litigation—sometimes by auction, sometimes by negotiation, sometimes for a percentage of recovery, sometimes for a lodestar hourly rate and a multiplier for riskbearing. (The greater the risk of loss, the greater the incentive compensation required.) Timing is more important than the choice between negotiation and auction, or between percentage and hourly rates, for all of these systems have their shortcomings. Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty; only *ex ante* can the costs and benefits of particular systems and risk multipliers be assessed intelligently. Before the litigation occurs, a judge can design a fee structure that emulates the incentives a private client would put in place. At the same time, both counsel and class members can decide whether it is worthwhile to proceed with that compensation system in place.

5 Newberg on Class Actions § 15:7 (5th ed.) (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 718-19 (7th Cir. 2001) (citations omitted).

There are "a series of advantages to *ex ante* fee setting." 5 Newberg on Class Actions § 15:7 (5th ed.) ("Courts that set a fee *ex ante* cannot finalize that fee, for procedural reasons, until the conclusion of the litigation, but there may nonetheless be a series of advantages to *ex ante* fee setting.") (citation omitted).

> First, *ex ante* fee negotiations best mimic the private market: clients hire attorneys and work out their payment system at the outset of the retention, not at its conclusion. Second, an advantage of mimicking the market is that the *ex ante* discussion of the substance of fees sets the lawyers' expectations about their likely reward at the conclusion of the case and hence enables them to invest their resources in the litigation with some certainty as to their plausible return. Third, and relatedly, early fee setting has the potential to set incentives appropriately for class counsel; for example, counsel may be entitled to an increasing percentage the more value she obtains for the class, thus incentivizing her to push for the maximum class recovery. Fourth, courts have noted that they are not institutionally adept at judging fees *ex post* and thus *ex ante* fee setting may have a comparative institutional advantage. Some of the problems *ex post* are technical (such as auditing thousands of fee record entries) but some are more substantive: the Seventh Circuit has noted that at the conclusion of the case, "hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low." Fifth, some limited empirical evidence suggests that *ex ante* fee negotiations reduce fee levels and thus amplify the class's recoveries.

5 Newberg on Class Actions § 15:7 (5th ed.) (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 718 (7th Cir. 2001). Amplifying on the tendency of post-settlement analysis to underestimate the risk of litigation (i.e. hindsight bias[28]), the

[28] See Fox v. CDX Holdings, Inc., No. CV 8031-VCL, 2015 WL 4571398, at *3 (Del. Ch. July 28, 2015) ("Hindsight bias has been defined in the psychological literature as the tendency for people with outcome knowledge to believe falsely that they would have predicted the reported outcome of an event. Studies

Seventh Circuit observed that "[o]nly *ex ante* can bargaining occur in the shadow of the litigation's uncertainty…."

The fact that the Receiver was appointed by a state court, and that WSL's fees were approved by a state court judge, should not diminish the significance of their approval and oversight, notwithstanding that this is a federal class action. Judge Stern can be viewed as an eminently suitable proxy for this Court. Moreover, a strong argument can be made that state law should govern the approval of fees affecting an entity in receivership in state court. Indeed, the fees will be paid from the gross settlement proceeds received by the Plan, the corpus of which is under the exclusive jurisdiction of the state court. In addition, many of Plaintiffs' claims against CharterCARE Foundation are based on state law that would not be preempted even if ERISA applies to the Plan, such as Plaintiffs' claims that arose before the Plan ceased to be a church plan, and Plaintiffs' claims for fraudulent transfers.[29] Moreover, the transfer to CharterCARE Foundation of the $8,200,000 was by order of the Superior Court, and Plaintiffs were obligated to intervene in the 2015 *CY Pres* Proceeding in

---

have demonstrated not only that people claim that they would have known it all along, but also that they maintain that they did, in fact, know it all along.") (citations and quotations omitted). See also In re Checking Account Overdraft Litigation, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) ("Plaintiffs properly note that Objectors' argument regarding the sufficiency of the Settlement amount suffers from hindsight bias and an unduly sanguine view of Plaintiffs' litigation risks—risks that these Objectors never faced because they arrived on the scene after the Settlement was reached. A settlement fairness analysis must consider such risks at the time the settlement was reached, not after settlement.").

[29] See Dkt #100 (Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss) at 161-62 (pointing out that Plaintiffs' claims arose before the Plan was placed in Receivership and arguably lost church plan status); Dkt #99-1 (Plaintiffs' Memorandum in Support of Their Objection to The Motions to Dismiss Filed by Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC and Prospect Chartercare RWMC, LLC) at 31-33 (addressing how state law fraudulent transfer claims are not preempted by ERISA).

state court to secure relief from that order. In short, the state law aspects of Plaintiffs' claims against CharterCARE Foundation greatly outweigh any federal issues, even if ERISA is ultimately determined to be applicable to the Plan.

In a related context, the First Circuit and other federal courts have deferred to state law in determining attorneys' fees in class action common fund cases based on diversity. See In re Volkswagen & Audi Warranty Extension Litig., 692 F.3d 4, 15 (1st Cir. 2012) ("We also start with the basic premise that the issue of attorneys' fees has long been considered for *Erie* purposes to be substantive and not procedural, and so state-law principles normally govern the award of fees."). See Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII–A, L.P., 888 F.3d 455, 462-63 (10th Cir. 2017) (applying Oklahoma state law to determine method of calculating attorneys' fees in settlement of class action) ("[T]here appears to be a consensus among those circuits that have considered the matter. We have found decisions from five other circuits. When state law governs whether to award attorney fees, all agree that state law also governs how to calculate the amount.").

B. WSL's fee application is fair and reasonable under the market-mimicking approach

As noted, WSL's fee application is fair and reasonable under both the specific facts of this case and the *ex ante* approach. In addition, the Retainer Agreement is conclusive evidence of what a reasonable fee would be under the market-mimicking approach.

The market-mimicking approach is "based on the goal of establishing a rate commensurate with what a free market would establish: 'The object in awarding a

reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible.'" 5 Newberg on Class Actions § 15:79 (5th ed.) (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)). "When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set. The judge, in other words, is trying to mimic the market in legal services." Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998) (citations omitted).

Thus, courts called upon to approve fee applications in class action cases using the market-mimicking approach are directed to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." In re Synthroid Marketing Litigation, 264 F.3d 712, 718 (7th Cir. 2001). The Seventh Circuit has suggested that district judges "compare the contingent-fee percentage sought by the class lawyers . . . with contingent fees set by arms-length contracts between lawyers and their clients in comparable commercial litigation." Matter of Continental Illinois Securities Litigation, 985 F.2d 867, 868 (7th Cir. 1993). This suggestion was premised on the contention that "[t]hese contracts would provide a market estimate of the value of the class lawyers' service to the class, in accordance with the principle that a judge in setting a fee award should be trying to give the lawyers what they would have got in a voluntary transaction in the market for legal services." Matter of Cont'l Illinois Sec. Litig., *supra*, 985 F.2d at 868.

As noted, two district courts in the First Circuit have adopted the market-mimicking approach, as superior to either the multifactor approach or a blindly applied

fixed percentage. See In re Cabletron Sys., Inc. Sec. Litig., 239 F.R.D. 30, 41 (D.N.H. 2006) ("In spite of the limitations associated with a market based analysis, it is apparent to this Court that this approach is far more preferable than a subjective multi-factor approach, or a blindly applied fixed percentage."); Nilsen v. York County, 400 F. Supp. 2d 266, 278–79 (D. Me. 2005) (rejecting the multifactor approach and adopting "the methodology of the Seventh Circuit as most reflective of what a judge does instinctively in setting a fee as well as most amenable to predictability and an objective external constraint on a judge's otherwise uncabined power. . . . The market-mimicking approach has its own shortcomings but it is better than the fuzzier alternatives.").

Here the Court need look no further than the Retainer Agreement between WSL and the Receiver to determine what fee WSL would have obtained in a voluntary transaction in the market for legal services to the settlement class.[30] The only difference is that the Retainer Agreement was entered into between WSL and the Receiver (acting under fiduciary obligation and supervision of the Superior Court), rather than with the settlement class. Otherwise the representation is identical, involving the same claims, the same defendants, and the same direct beneficiary of any recovery (the Plan). It is difficult to conceive of a more apt basis to estimate the market value of WSL's services. Moreover, the Settlement Class clearly will benefit from WSL's fees

[30] Retainer agreements with substantively identical fee provisions were also entered into with each of the Class Representatives. See Dkt #65-12 (with Gail J. Major); Dkt #65-13 (with Nancy Zompa); 65-14 (with Ralph Bryden); Dkt #65-15 (with Dorothy Willner); Dkt #65-16 (with Caroll Short); Dkt #65-17 (with Donna Boutelle); Dkt #65-18 (with Eugenia Levesque). These additional retainer agreements further underscore that WSL's fee was in accordance with the market rate for such legal services.

being based upon 23.33% set forth in the Retainer Agreement rather than WSL's usual contingent fee of between 33.33% and 40% of the gross recovery.[31]

C. WSL's fee application is fair and reasonable under the multi-factor approach

In addition, the Retainer Agreement is fair and reasonable under the multifactor approach. The multifactor test is usually based on the "so-called *Goldberger* factors":

> "(1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations."

In re Neurontin Mktg. & Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (quoting In re Lupron Mktg. & Sales Practices Litig., No. MDL 1430, 01–CV–10861–RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005)) (citing Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000)) (approving an award of 28% of the settlement fund).

All of the Goldberger factors weigh in favor of WSL's fee request. The recovery in this case, although substantial, does not involve a multi-billion dollar fund, in which even an attorneys' fee of a small percentage would be in the hundreds of millions of dollars. Moreover, more than 2,700 individuals and their families are benefited by increased retirement benefits. WSL have demonstrated skill, experience, and efficiency. The litigation is extremely complex, and has already been proceeding for two years (inclusive of the investigative phase). WSL has devoted thousands of hours of attorney time. Finally, Plaintiffs' Counsel are seeking an award which is 23.33% of the

[31] Wistow Second Supp. Dec. ¶ 8.

gross settlement amount, which is below the award that would be due under the 25% benchmark for common fund cases.

IV. The objections of the Diocesan Defendants should be rejected

A. The Diocesan Defendants lack standing to challenge WSL's fee application

The Diocesan Defendants alone[32] have objected to WSL's fee application. Their objections are substantively meritless, as discussed below.

However, the Court need not even consider their objection, because the Diocesan Defendants (and the other Non-Settling Defendants) lack Article III standing to object to the fee application, since they are neither paying nor receiving these fees. See Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 23 ("A class member and any party from whom payment is sought may object to the fee motion. **Other parties—for example, nonsettling defendants—may not object because they lack a sufficient interest in the amount the court awards.**")[33] (emphasis supplied). See also Roberts v. Heim, No. C 84-8069 TEH, 1991 WL 427888, at *2 (N.D. Cal. Aug. 28, 1991) ("[non-settling defendants] PM and S & A are without standing to object to the attorneys' fees requested, since they are neither paying nor receiving those fees."); Boeing Co. v. Van Gemert, 444 U.S. 472, 481 n.7 (1980) (recognizing the

[32] Neither the Prospect Defendants nor The Angell Group, Inc. ("Angell") has filed an objection to WSL's fee application in connection with Settlement B.

[33] See also 6A Fed. Proc., L. Ed. § 12:444 ("A class member or a party from whom payment is sought, may object to the motion for an award of attorney's fees and nontaxable costs. Other parties—for example, nonsettling defendants—may not object because they lack a sufficient interest in the amount the court awards.") (citing Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 23); 32B Am. Jur. 2d Federal Courts § 1840 ("A class member or a party from whom payment is sought, may object to the motion for an award of attorney's fees and nontaxable costs. Other parties—for example, nonsettling defendants—may not object because they lack a sufficient interest in the amount the court awards.") (also citing Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 23).

defendant "had no cognizable interest in further litigation between the class and its lawyers over the amount of the fees ultimately awarded from money belonging to the class"); Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 855 (10th Cir. 1993) (concluding where the fee awarded "came out of the common fund remaining after payment of class counsel's fee," only "the plaintiff class . . . could be considered aggrieved by that award").

The conclusion that the Non-Settling Defendants lack standing to object to a fee award from a common fund is also implicit in the First Circuit's directive that "the court shapes the counsel fee based on what it determines is **a reasonable percentage of the fund recovered for those benefitted by the litigation**." Thirteen Appeals, *supra*, 56 F.3d at 305 (emphasis added). The Non-Settling Defendants neither are the recipients of funds nor directly "benefitted by the litigation."

Indeed, not only are they neither paying nor receiving these fees, the Non-Settling Defendants will receive a credit against their liability to Plaintiffs in the full amount of the amount paid in settlement by the Settling Defendants, without any reduction for any attorneys' fees awarded to WSL, either pursuant to the Settlement Statute, or, if the Settlement Statute does not apply for any reason, then under the Uniform Contribution Among Tortfeasors Statute. See R.I. Gen. Laws § 23-17.14-35(1) ("A release by a claimant of one joint tortfeasor, whether before or after judgment, does not discharge the other joint tortfeasors unless the release so provides, but the release shall reduce the claim against the other joint tortfeasors **in the amount of the consideration paid for the release**.") (emphasis supplied); R.I. Gen. Laws § 10-6-7 ("A release by the injured person of one joint tortfeasor, whether before or after judgment,

does not discharge the other tortfeasors unless the release so provides; **but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release**, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.") (emphasis supplied).

Thus, the credit to the Diocesan Defendants will be based upon the gross settlement amount, not the net recovery after attorneys' fees, and the amount of WSL's fees will not in any way affect the Diocesan Defendants' liability. See Abselet v. Levene Neale Bender Yoo and Brill L.L.P., No. CV166263JFWJEMX, 2017 WL 8236272, at *4 (C.D. Cal. Nov. 17, 2017) ("Thus, the terms of the Settlement Agreement between Plaintiff and the Barlava Defendants actually improve Levene Neale's position (and the position of the other non-settling defendants) by reducing the amount of Plaintiff's recoverable damages. The fact that Plaintiff's recoverable damages are reduced for all of the non-settling defendants amply demonstrates that the Settlement Agreement was not the product of collusion, fraud, or tortious interference and supports a finding that the Settlement Agreement was negotiated in good faith.").

Under these circumstances, it is clear that the Diocesan Defendants' only interest in the amount of fees to be awarded WSL is an illegitimate interest in making this case as uneconomical as possible for WSL, in order to put WSL in the unenviable position of proceeding with representation on terms that are not only financially onerous, but also are contrary to WSL's agreement. More importantly, the effect could be detrimental to the interests of the Plan participants going forward.

B. The Diocesan Defendants' objections are meritless

The Diocesan Defendants oppose WSL's fee application based on the following contentions:

- "on account of Plaintiffs' failure to join the Pension Benefit Guaranty Corporation ('PBGC')"[34];
- because "Plaintiffs' counsel has not broken down the hours that Plaintiffs' counsel devoted to litigation with CCF or procuring the settlement from that defendant"[35];
- the "CCF Fee Motion also improperly asks that the Court consider how the class benefited from Plaintiffs' Counsel's investigative efforts, work for which they have already been paid"[36];
- "the Court should look to the usual lodestar method at least as a check on the fees requested here"[37];
- the "CCF Fee Motion does not explain why such a significant divergence between the lodestar and the percentage of fund method is appropriate";[38] and
- "any decision on fees is premature" because "the Court does not have a clear picture as to what Plaintiffs' total recovery and requested fees might be".[39]

All of these arguments (all of which the Diocesan Defendants lack standing to assert) are meritless.

First, PBGC is irrelevant to the proposed settlements of WSL's fee applications. In any event, Plaintiffs have no obligation, right, or (even) power to join PBGC in this action, for multiple reasons that are fully set forth in Plaintiffs' prior memoranda.[40]

---

[34] Dkt #80 at 3.

[35] Dkt #80 at 3.

[36] Dkt #80 at 3.

[37] Dkt #80 at 3.

[38] Dkt #80 at 43.

[39] Dkt #80 at 4.

Second, it is neither necessary nor possible to accurately identify those hours of WSL's time that solely concern Plaintiffs' claims against CCF or otherwise contributed to the settlement. The Diocesan Defendants certainly cite no authority for this requirement. In any event, virtually all of the issues in this case relate directly or indirectly to Plaintiffs' claims against all of the Defendants, because Plaintiffs contend (and specifically alleged in the Complaint[41]) that all of the Defendants, including CCF, participated in a conspiracy to defraud the Plan. Under the law of conspiracy, each member of the conspiracy is liable for the wrongful acts of other members of the conspiracy in furtherance of the conspiracy, even if they were unaware of or actually opposed those acts.[42] Accordingly, WSL's efforts to prove Plaintiffs' claims against any of the other Defendants also support Plaintiffs' claims against CCF, and can be said to have contributed to Settlement B.

Third, although the Court has discretion to do so if the Court believes it necessary or appropriate, in the First Circuit there is no requirement that the Court employing the POF method even consider Plaintiffs' Counsel's hours as a cross-check. See 5 Newberg on Class Actions § 15:88 (5th ed.) ("Two circuits (First and Eighth) have held that the cross-check is entirely discretionary. . . .") (citing In re Thirteen Appeals

---

[40] See Dkt #100 (Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss) at 99-123, 125-45.

[41] See FAC ¶¶ 502-05.

[42] See Plaintiffs' Memorandum in Support for Their Objection to the Prospect Entities' Motion to Dismiss (Dkt #99-1) at 85-87 (quoting State v. Mastracchio, 612 A.2d 698, 706 (R.I. 1992) (Rhode Island "has adopted the rule that 'where several persons combine or conspire to commit an unlawful act . . . each is responsible for everything done by one or all of his confederates, in the execution of the common design, as one of its probable and natural consequences, even though the act was not a part of the original design or plan, or was even forbidden by one or more of them.'")).

Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 307 (1st Cir. 1995)) (other citation omitted). WSL's fee application has the express approval of the Superior Court, of the Receiver as a fiduciary and as an officer of the Superior Court, and of counsel for nearly 1,000 class members. Thus, WSL's fee application is fair and reasonable under the specific facts of this case, and no lodestar cross-check is even indicated. See also In re Mfrs. Life Ins., No. 1109, 1998 WL 1993385, at *10 (S.D. Cal. Dec. 21, 1998) ("Rather than directing plaintiffs' counsel to provide further details [concerning attorney time], however, the Court concludes that a lodestar analysis is unnecessary.") (approving $36 million for attorneys' fees as "reasonable under the circumstances" without lodestar check).

Moreover, even if the Court were to conduct a lodestar cross-check, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting." In re Rite Aid Corp. Securities Litigation, 396 F.3d 294, 306 (3d Cir. 2005); In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 273 (D.N.H. 2007) (same) (quoting In re Rite Aid Corp. Securities Litigation). Crucially, the POF approach with a lodestar cross-check calculation does not require the same detail as would be required for an award of attorneys' fees under a statutory allowance of attorneys' fees to the prevailing party. Brown v. Rita's Water Ice Franchise Company LLC, 242 F. Supp. 3d 356, 368 (E.D. Pa. 2017) ("In determining the reasonableness of the time spent in a lodestar cross-check, a summary of hours, rather than the detail required to calculate the lodestar for a prevailing party award, normally suffices.").

Fourth, the Diocesan Defendants' objection to WSL's hourly totals including time during the investigative phase for which WSL was paid a reduced hourly fee is without

merit. The Settlement Class has directly benefitted from WSL's services during the Investigative Phase, and WSL of its own volition has given the Plan a credit for those fees.

Fifth, the Diocesan Defendants' calculation of the lodestar cross-check is faulty. The lodestar cross-check is based upon multiplying counsel's hours by their hourly rates, determining whether the proposed fee is a positive or negative multiplier of that number, and then determining whether the multiplier is reasonable:

> The lodestar cross-check enables a court to assess the reasonableness of a proposed percentage award by comparing that proposal to counsel's lodestar (their hours multiplied by their hourly rates). The comparison yields a number reflecting the extent to which the proposed percentage award is a positive or negative multiple of counsel's lodestar. A court must then assess whether that multiplier is reasonable in the context of the particular case.

5 Newberg on Class Actions § 15:87 (5th ed.).

Although the Diocesan Defendants reject the Retainer Agreement as the basis for determining WSL's percentage fee, the Diocesan Defendants embrace the $375 per hour hourly rate for investigative services provided in the Retainer Agreement as indicative of WSL's hourly rates and the market rate for such services. The Diocesan Defendants cannot have it both ways. The $375 hourly rate and the 23.33% contingent fee are linked. WSL agreed to a reduced hourly rate *because* of the agreement on its percentage contingent fee.[43]

[43] Wistow Second Supp. Dec. ¶¶ 8-10.

In any event, the $375 hourly rate in the Retainer Agreement is well below WSL's customary blended rate in non-contingent fee cases,[44] and below the market rate for legal fees charged in complex multi-million dollar commercial litigation by firms of comparable stature and experience.[45] WSL's standard blended normal hourly rate for the attorneys involved in this case in the few non-contingent fee hourly cases WSL undertakes is over $600.[46] WSL's total hours are in excess of 4,072 hours.[47] The lodestar cross-check based on that $600 number, applied to the fees WSL is seeking in connection the minimum liquidated[48] sums to be paid in both Settlements A and B, would be 1.27.[49]

However, even that is comparing chalk and cheese, because this case is on a contingent fee. As in this case, most of WSL's clients are plaintiffs in contingent fee cases, in which the average effective hourly rate if the case is successful is usually many times even that multiplier, but in which WSL receives no payment whatsoever in cases that do not earn a contingent fee.[50] Accordingly, it also would be fair and

---

[44] Wistow Second Supp. Dec. ¶ 10.

[45] See Del Sesto Dec. ¶ 7 ("During the investigative phase of WSL's representation, they would be paid $350, which they informed me was below their normal hourly rate. Based on my knowledge of legal fees charged in complex multi-million dollar commercial litigation by firms of comparable stature and experience, I believed that rate was indeed below market rates.").

[46] Wistow Second Supp. Dec. ¶ 8.

[47] Dkt #65 (Wistow Dec.) ¶ 18; Wistow Second Supp. Dec. ¶ 6.

[48] As discussed below, Settlement A also contemplates the Plan obtaining a recovery from illiquid assets, but WSL will have to devote additional time and resources to obtain those recoveries.

[49] Based upon the retainer agreement but also crediting $552,281.25 (the amount paid in representing the receiver during the Investigative Phase), WSL seeks $1,049,850 in connection with Settlement B, and $2,043,181.13 in connection with the liquidated sum of $11,125,000 to be paid in Settlement A, for a total of $3,093,031.30. The lodestar is $2,433,600 ($600 x. 4,056). The lodestar cross-check based on those proposed fees, therefore, is 1.27. And even if that calculation is performed based on total compensation inclusive of the amount paid during the Investigative Phase, the lodestar cross-check would produce 1.49.

[50] Wistow Second Supp. Dec. ¶ 8.

reasonable to award WSL fees that are several multiples of WSL's average hourly rate in non-contingent fee cases, which would greatly exceed the percentage recovery WSL is seeking pursuant to the Retainer Agreement. However, WSL is abiding by its agreement with the Receiver as approved by the Superior Court, and basing its fee application on the Retainer Agreement, rather than on a lodestar multiplier which arguably would produce a much larger award.

Finally, by arguing that "any decision on fees is premature" because "the Court does not have a clear picture as to what Plaintiffs' total recovery and requested fees might be," the Diocesan Defendants would have WSL receive no fees whatsoever until the total recovery in the entire case is determined. That is both absurd and punitive. Under Settlements A and B, the Plan will have an immediate net recovery of at least $12,531,969,[51] with the possibility of substantial additional funds from CCCB's interest in Prospect Chartercare, and from the judicial liquidations of RWH, SJHSRI, and CCCB which may take years. Moreover, recoveries from the Non-Settling Defendants are uncertain and also may take years. WSL cannot be expected to secure immediate recoveries for the Plan but not receive payment until years later when the judicial liquidations and the claims against the Non-Settling Defendants are finally completed and resolved.

The uncertainty of Plaintiffs' total recovery (and, consequently, WSL's fees) from Settlement A does not detract from approval of these settlements and WSL's fee applications. No two settlements are exactly alike, but courts routinely approve fee

[51] $11,125,000 from Settlement A, plus $4,500,000 from Settlement B, minus WSL's proposed total fees of $3,093,031.30.

awards in partial settlements in class actions which involve initial cash payments and assignment of *choses* in action and contract rights against third parties on which the ultimate recovery is unknown and unknowable. See. e.g., In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 130 (D.N.J. 2002) (approving an class action plaintiff attorneys' fee of one-third of certain common stock that was to be paid immediately in the settlement, twenty percent of any amounts to be later recovered as a result of litigation or negotiated settlement from funds then frozen in the Isle of Man; and thirty percent of all other amounts later recovered as a result of litigation or negotiated settlements, whether inside or outside the United States). In settlement involving assignments of choses in action that will be pursued in the future, it is entirely appropriate and in the interests of the Settlement Class to structure attorneys' fees in advance of those recoveries. See. e.g., id. at 113 ("[T]the Settlement closely aligns the pecuniary interests of the Class with that of Plaintiffs' Counsel and the Co Trustees, ensuring a diligent pursuit of those funds on behalf of the Class."). Otherwise attorneys would be discouraged from representing class plaintiffs in complex, multi-party litigation, and would have no incentive to obtain assignments of *choses* in action or contract rights in connection with settlements, notwithstanding that (as in this case) they may be very valuable to the Settlement Class.

Indeed, awarding WSL a fee of 23.33% of the future recoveries obtained in connection with Settlement A, as WSL is seeking in its fee application in connection with Settlement A, would be an entirely appropriate decision under the *ex ante* approach, since it would entail fee-setting in advance of the possible future recoveries. Moreover, any other approach would be unworkable and counterproductive. For example,

requiring a new fee application every time there is another recovery pursuant to Settlement A would necessitate potentially numerous rounds of settlement class notices, briefing, and hearings, contrary to judicial and party economy, and would make this class action more cumbersome for the Court, Parties, Settlement Class, and WSL.

In short, the Diocesan Defendants may prefer that WSL go unpaid for the indefinite future, because it serves their narrow self-interest, but it clearly is contrary to the public policy that underlies the award of attorneys' fees in class actions, which is to incentivize class plaintiffs' counsel to represent parties with valid claims that individually are too small to warrant suit.

C. The Non-Settling Defendants' objection to WSL's fee application involves structural unfairness in that counsel for the Non-Settling Defendants already have been paid many millions of dollars in attorneys' fees for defending against Plaintiffs' claims, and reasonably can expect to be paid many millions more as this lawsuit continues, but they contend WSL should be paid much less and not for many years

The Non-Settling Defendants have chosen not to disclose the basis for the fee arrangement with their counsel, or the amount of fees they have paid their own counsel. However, on June 27, 2019, the Prospect Entities notified RWH, SJHSRI, and CCCB that the Prospect Entities "have sustained Damages in an amount of at least $2,018,597.35 as a result of their costs of investigation and defense and reasonable attorneys' fees and expenses relating to claims against them arising out of the Retirement Plan."[52] Assuming that the Diocesan Defendants and Angell in the aggregate have incurred at least that sum, it appears that the Non-Settling Defendants

[52] The Prospect Entities' letter is attached hereto as Exhibit 1.

have already paid their attorneys many millions of dollars. Moreover, it may be assumed that these counsel are not working on a contingency, but, rather are entitled to payment win or lose (how else would they have already been paid such fees?). These fee arrangements enabled the Non-Settling Defendants to retain experienced and highly skilled attorneys. However, they seek to limit the options for the Settlement Class to attorneys who will work many years for less than the sums paid to defense counsel, and will only be paid out of recoveries, if any. That is anything but a level playing field, and would be grossly unfair and unjust to WSL, the Receiver, and the Settlement Class.

V. Plaintiffs' Counsel no longer seek an award of costs

WSL's reasonable disbursements are now being paid on an ongoing basis by the Receiver. Accordingly, WSL does not seek an award of expenses.

CONCLUSION

WSL's fee application should be approved.

Respectfully submitted,

Plaintiffs,
By their Attorney,

/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: August 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 15th day of August, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

Andrew R. Dennington, Esq.
Christopher K. Sweeney, Esq.
Russell V. Conn, Esq.
Conn Kavanaugh Rosenthal
Peisch and Ford, LLP
One Federal Street, 15th Floor
Boston, MA 02110
adennington@connkavanaugh.com
csweeney@connkavanaugh.com
rconn@connkavanaugh.com

David A. Wollin, Esq.
Christine E. Dieter, Esq.
Hinckley Allen & Snyder LLP
100 Westminster Street, Suite 1500
Providence, RI 02903-2319
dwollin@hinckleyallen.com
cdieter@hinckleyallen.com

Preston Halperin, Esq.
James G. Atchison, Esq.
Christopher J. Fragomeni, Esq.
Dean J. Wagner, Esq.
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860
phalperin@shslawfirm.com
jatchison@shslawfirm.com
cfragomeni@shslawfirm.com
dwagner@shslawfirm.com

Howard Merten, Esq.
Paul M. Kessimian, Esq.
Christopher M. Wildenhain, Esq.
Eugene G. Bernardo, II, Esq.
Steven E. Snow, Esq.
Partridge Snow & Hahn LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
hm@psh.com
pk@psh.com
cmw@psh.com
egb@psh.com

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

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

Joseph V. Cavanagh, III, Esq.
Joseph V. Cavanagh, Jr., Esq.
Blish & Cavanagh LLP
30 Exchange Terrace
Providence, RI 02903
Jvc3@blishcavlaw.com
jvc@blishcavlaw.com
lbd@blishcavlaw.com

David R. Godofsky, Esq.
Emily S. Costin, Esq.
Alston & Bird LLP
950 F. Street NW
Washington, D.C. 20004-1404
david.godofsky@alston.com
emily.costin@alston.com

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

John McGowan, Jr., Esq.
Baker & Hostetler LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
jmcgowan@bakerlaw.com

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

/s/ Max Wistow

Exhibit 1

SHECHTMAN HALPERIN SAVAGE, LLP

Attorneys At Law
A Limited Liability Partnership

Preston W. Halperin, Esq.
phalperin@shslawfirm.com

June 27, 2019

REGISTERED MAIL
RETURN RECEIPT REQUESTED
(9590926699042145734985-Land)
(9590926699042145734992-Hirsch)

CharterCARE Community Board
c/o Richard L. Land, Esq.
One Park Row, Suite 300
Providence, RI 02903

David Hirsch, President
CharterCARE Community Board
50 South Main Street
Providence, RI 02903

Re: Demand for Indemnification

Dear Mr. Hirsch:

This firm represents Prospect Medical Holdings, LLC ("Prospect") and Prospect East Holdings, Inc. (the "Prospect Member") in connection with the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare, LLC, as amended (the "LLC Agreement") and the Asset Purchase Agreement among Chartercare Health Partners, et al and Prospect, the Prospect Member, et al, dated as of September 24, 2013 (the "APA").

We are writing pursuant to Section 17.2 (a) the LLC Agreement to demand that you comply with the indemnification provisions of the APA by making payment to Prospect and the Prospect Member for Damages (as that term is defined in Section 14.2 of the APA) arising from or in connection with the St. Joseph Health Services of Rhode Island Retirement Plan (the "Retirement Plan") which is one of the "Excluded Liabilities" under the APA. You are further notified that Prospect and the Prospect Member are entitled to indemnification pursuant to Sections 14.2(d) and 14.5 of the APA based upon Damages incurred in connection with the civil actions entitled, *St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan*, C.A. No. PC-2017-3856, Providence Superior Court and *Stephen DelSesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode*

Island Retirement Plan v. Prospect Chartercare, LLC, et al, Case No. 1:18-cv-00328-WES-LDA, United States District Court, District of Rhode Island.

To date, Prospect and the Prospect Member have sustained Damages in the amount of at least $2,018,597.35 as a result of their costs of investigation and defense and reasonable attorneys' fees and expenses relating to claims against them arising out of the Retirement Plan. Because these actions are ongoing, Prospect and the Prospect Member anticipate that they will incur substantial additional Damages. Pursuant to Section 17.2 (a) of the LLC Agreement, Prospect and the Prospect Member reserve all rights and remedies, including, without limitation those set forth in the aforesaid Section 17.2 (a) should you fail to pay all of such amount within thirty (30) days from your receipt of this demand.

Very truly yours,

Preston Halperin

Preston W. Halperin

Cc: Prospect East Holdings, LLC
Prospect Medical Holdings, LLC