STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: March 4, 2021]

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
v.	:	**C.A. No. PC-2017-3856**
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended et al.;	:	
and	:	
In re:	:	
CHARTERCARE COMMUNITY BOARD; ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND; and ROGER WILLIAMS HOSPITAL	:	**C.A. No. PC-2019-11756**

DECISION

STERN, J. Stephen Del Sesto, in his capacity as Permanent Receiver (Receiver) for the St. Joseph Health Services of Rhode Island Retirement Plan, petitions this Court (Petition) for approval of a proposed settlement agreement (PSA) of claims Receiver has asserted against Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect CharterCare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (collectively Prospect), The Angell Pension Group, Inc. (Angell Pension), Samuel Lee, David Topper, (Prospect, Angell Pension, Lee, and Topper (collectively Settling Defendants)), and certain individuals and entities associated with the Settling Defendants, in lawsuits concerning the alleged underfunded status of the Plan. Thomas Hemmendinger, in his capacity as liquidating receiver (Liquidating Receiver), joins the Receiver

in the Petition and simultaneously files the Petition in the matter of *In re CharterCare Community Board,* PC-2019-11756. There are no objections to the Petition.

I

Facts and Travel

On August 18, 2017, St. Joseph Health Services of Rhode Island (SJHSRI) petitioned this Court to place the St. Joseph Health Services of Rhode Island Retirement Plan (Plan) into receivership, alleging that the Plan was insolvent and seeking to reduce the Plan participants' benefits by 40 percent. (Receiver's Pet. Settlement Instr. Approval 3, Jan. 25, 2021 (Pet.).) The instant Petition comes after (1) years of the Plan's financial distress; (2) an affiliation agreement between SJHSRI and Roger Williams Hospital (RWH) that organized into CharterCare Community Board (CCCB); (3) an Asset Purchase Agreement (2014 APA) whereby CCCB transferred substantially all of its operating assets to Prospect CharterCare, LLC (PCC) in exchange for a cash payment and a fifteen-percent interest in PCC; and (4) a multitude of lawsuits that followed and substantially arose from these events. (Pet. Appointment Receiver ¶ 2 n.2 (Aug. 18, 2017); Mem. Supp. Joint Obj. 3-4 (Sept. 27, 2018).)

Nevertheless, in August of 2017, due to its severe undercapitalization, the Court appointed Del Sesto as Temporary Receiver of the Plan, and on October 27, 2017, the Court made that appointment permanent. (Order Appointing Temporary Receiver ¶¶ 1-3 (Aug. 18, 2017); Order Appointing Permanent Receiver (Oct. 27, 2017); Pet. ¶¶ 3, 5.) On October 11, 2017, the Receiver sought leave from this Court, and the Court granted its petition, to engage Wistow, Sheehan & Loveley, PC (WSL) as Receiver's Special Litigation Counsel (Special Counsel). (Order Approving Receiver's Emergency Pet. (Oct. 17, 2017); Pet. ¶ 4.) Special Counsel was retained to "investigate potential liability or obligation of any persons or entities to pay damages or funds to the Plan" and

pursue claims against those persons or entities. (Pet. Ex. G.) WSL was also retained by seven individual Plan participants to investigate and pursue claims on their behalf, which fostered into a class action. (Pet. ¶ 7.)

Special Counsel engaged in pre-suit investigation over an eight-month period and filed two complaints one in federal court (Federal Action) and the other in state court.[1] *Id.* ¶¶ 9-10. In June of 2018, these actions led to two settlements—the first settled claims against CCCB, SJHSRI, and RWH, and the second settled claims against CharterCARE Foundation—that grossed $17,1818,202.91, whose net proceeds were contributed to fund the Plan. *Id.* ¶¶ 13-14. In connection with the first settlement, Receiver also obtained CCCB's beneficial interest in PCC, including claims that CCCB had against PCC. *Id.* ¶ 23. The transfer of CCCB's beneficial interest to the Receiver is subject to suit in the Chancery Court of Delaware, whereby Prospect claims indemnity and asserts that the transfer was in breach of CCCB's obligations under the LLC Agreement, and, thus, void. *Id.* ¶ 34. Subsequently, CCCB filed an action in this Court asserting various claims against Prospect, Lee, Topper, and others.[2] *Id.* ¶ 24. CCCB claimed, *inter alia*, that Prospect breached its obligations under the 2014 APA and wrongfully withheld the information necessary for CCCB to evaluate its exercise of a put option pursuant to the LLC Agreement executed in connection with the 2014 APA. *Id.* ¶ 25.

Meanwhile, the Federal Action was intensively litigated, as motions to dismiss were converted to those for summary judgment relative to the Plaintiffs'[3] Employees Retirement

---

[1] *Stephen Del Sesto v. Prospect CharterCare, LLC*, C.A. No. 18-328-WES, 2019 WL 4225323 (D.R.I. Sept. 5, 2019), pending in the U.S. District Court for the District of Rhode Island (Federal Action); and *Stephen Del Sesto v. Prospect CharterCare, LLC*, C.A. No. PC-2018-4386, pending in the Rhode Island Superior Court (State Action). The state court action was stayed pending the adjudication of the Federal Action.

[2] *CharterCARE Community Board v. Samuel Lee*, C.A. No. PC-2019-3654 (*CCCB v. Lee*).

[3] "Plaintiffs" means plaintiffs in the Federal Action and State Action, *supra* n.1.

Security Act of 1974 (ERISA) claims and discovery was enlarged. (Pet. ¶¶ 27-30.) During the heat of the Federal Action, two administrative proceedings commenced. In the first, entitled *In re Change in Effective Control Applications by Prospect Chartercare RWMC, LLC and Prospect Chartercare SJHSRI, LLC, et al.* (CEC Application), filed with the Center for Health Systems Policy and Regulation, Rhode Island Department of Health, Prospect sought approval for a buyout—funded by Prospect Medical Holdings, Inc.—of a private investment fund's interest in Prospect Medical Holdings, Inc.'s parent company. (Pet. ¶¶ 31, 39.) In the second proceeding, Prospect sought the Attorney General's approval for this same transaction. (Aff. Stephen P. Sheehan ¶ 19 (Oct. 7, 2020).)

In December of 2019, Thomas Hemmendinger was appointed as Temporary Liquidating Receiver of CCCB, SJHSRI, and RWH and in January 2020, was converted to Permanent Liquidating Receiver for the purpose of dissolving and liquidating all assets of those entities. (Order Appointing Temporary Liquidating Receiver (Dec. 18, 2019); Order Appointing Permanent Liquidating Receiver (Jan. 9, 2020).) Special Counsel and Liquidating Receiver later filed formal objections in both administrative proceedings over concerns that any transfers of assets funded by Prospect Medical Holdings, Inc., a guarantor of obligations to PCC in which CCCB maintained an interest, would interfere with CCCB's interest and Receiver's ability to recover for the Plan. *Id.* ¶¶ 39-40.

Indeed, this PSA comes after years of litigation in the various proceedings,[4] including two receiverships, four judicial proceedings, and two administrative proceedings and seeks to resolve

[4] Receiverships: (1) *St. Joseph Health Services of Rhode Island v. St. Joseph Health Services of Rhode Island Retirement Plan, as amended et al.*, C.A. No. PC-2017-3856; (2) *In re CharterCARE Community Board*, C.A. No. PC-2019-11756.
Judicial Proceedings: Federal Action: *Stephen Del Sesto v. Prospect CharterCare, LLC, supra* n.1. R.I. State Court Actions: (1) *Stephen Del Sesto v. Prospect CharterCare, LLC, supra* n.1.; (2)

a substantial majority of the claims and further fund the Plan for its participants. The Receiver believes that the PSA is in the best interests of the Receivership Estate, the Plan, and the Plan participants, and recommends that the Court approve the PSA. (Pet. 3 (Jan. 25, 2021).) In addition, Retired Chief Justice Frank J. Williams, who presided over the parties' mediation, Attorney Arlene Violet, who represents over 285 Plan participants, Attorney Christopher Callaci, who represents approximately 400 Plan participants, and Attorney Jeffrey W. Kasle, who represents 247 Plan participants, concur with the Receiver's belief that the PSA is reasonable, fair, and in the best interests of all parties, including the Plan participants. (Decl. Frank J. Williams ¶ 5; Decl. Arlene Violet ¶¶ 6-8; Decl. Christopher Callaci ¶ 2; Decl. Jeffrey W. Kasle ¶ 6.) The Receiver also requests that the Court approve the attorneys' fees, which will be paid to Receiver's Special Litigation Counsel, subject to the terms of the retainer that was previously approved by this Court and subject to approval of the United States District Court for the District of Rhode Island (U.S. District Court). (Pet. at 3; Pet. Ex. G.)

The PSA contemplates that, if it is approved by this Court and the U.S. District Court, the claims against the Settling Defendants will be dismissed.[5] Namely, upon approval of the PSA, claims against the Settling Defendants will be dismissed in the following actions: (1) *Stephen Del Sesto v. Prospect CharterCare, LLC*, 2019 WL 4225323, pending in the U.S. District Court; (2) *Stephen Del Sesto v. Prospect CharterCare, LLC*, C.A. No. PC-2018-4386, pending in this Court;

CCCB v. Lee, supra n.2. Delaware State Court Action: *Prospect Medical Holdings, Inc. v. CCCB*, C.A. No. 2019-1018.
Administrative Proceedings: CEC Application and HCA Application.

[5] However, Plaintiffs in the Federal Action will continue to pursue the claims against Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation. (Pet. at 2.) Additionally, Liquidating Receiver will continue to "wind[] down the affairs of the Legacy Hospitals[,]" namely CharterCare Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital. (Hr'g Tr. 3:21-25; 4:1-6 (Feb. 12, 2021).)

and (3) *CharterCARE Community Board (CCCB) v. Samuel Lee*, C.A. No. PC-2019-3654, pending in this Court. (Pet. Ex. A, ¶ 6.) In addition, an action pending in the Chancery Court of Delaware, *Prospect Medical Holdings, Inc. v. CCCB*, C.A. No. 2019-1018, will be dismissed. *Id.* Likewise, the Receiver and Liquidating Receiver will withdraw the formal objections they have filed in the following administrative proceedings: *In re Change in Effective Control Applications by Prospect Chartercare RWMC, LLC and Prospect Chartercare SJHSRI, LLC, et al.* (CEC Application); and *Hospital Conversion Initial Application of Chamber Inc., Ivy Holdings Inc., Ivy Intermediate Holdings, Inc., Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect East Hospital Advisory Services, LLC, Prospect CharterCARE, LLC, Prospect CharterCare SJHSRI, LLC, Prospect CharterCare RWMC, LLC* (HCA Application).

The PSA also contemplates that the foregoing will be dismissed in consideration for, *inter alia*, $30,000,000, the net proceeds of which will be paid into the Plan after the payment of attorneys' fees and expenses. (Pet. ¶ 53.) The total of $30,000,000 includes a $2,750,000 contribution from Angell Pension and a $27,250,000 contribution from Prospect. *Id.* ¶ 51. Five million of Prospect's contribution is attributed to a buy out of CCCB's Hospital Interests, which is CCCB's fifteen percent interest in PCC and other Hospital Interests. *Id.* ¶ 52. On January 14, 2021, Angell Pension deposited its contribution into the Registry of the Court. *Id.* ¶ 57. Prospect's contribution is funded by two letters of credit (LOC(s)) issued by JPMorgan Chase Bank, N.A., including one LOC funded by Prospect Medical Holdings, Inc. in the amount of $22,250,000 (Prospect Medical LOC) and one LOC funded by Prospect East Holdings, Inc. in the amount of $5,000,000 (Prospect East LOC). (Pet. Ex A, ¶¶ 1(o)-(p).) On January 20, 2021, the LOCs were delivered to the Receiver. (Pet. ¶ 58.)

On February 12, 2021, this Court held a hearing on the Petition. The Receiver explained that the PSA would "bring [into the Plan] a net amount of approximately $23 million" and put the Plan's value nearly to $93,000,000, which is approximately $6,000,000 more than the pre-Receivership Petition value.[6] (Hr'g Tr. 36:10-14.) All parties involved in the PSA efforts request that the Court approve the proposal pursuant to G.L. 1956 § 23-17.14-35 as a good-faith settlement.[7]

II

Standard of Review

Although the Rhode Island Supreme Court has not firmly articulated a standard for the review of a receiver's recommended settlement for a receivership estate, the Supreme Court has empowered this Court to look to the Bankruptcy Code for guidance in receivership proceedings. *See Reynolds v. E & C Associates*, 693 A.2d 278, 281 (R.I. 1997). In particular, this Court has recognized the Bankruptcy Code as "an appropriate lens through which to analyze a receiver's petition to settle a legal action." Decision 6 (Oct. 29, 2018) (citing *Brook v. The Education Partnership, Inc.*, No. PB 08-4185, 2010 WL 1456787, at *3 (R.I. Super. Apr. 8, 2020)). Pursuant

[6] Receiver stated at the hearing that:

> "As of the filing of the report, your Honor, the plan had approximately $70 million in assets. As your Honor recalls when this case started, it was $85 million, just over $85 million. So, as I stated, we have about $70 million right now. The market has helped to slow the erosion of the plan, which is approximately $950,000 a month. That amount is for benefit payments. . . . [A]pprov[al] [of] the settlement . . . will bring a net amount of approximately $23 million into the case, which based on today's numbers . . . puts us at about $93 million, which . . . not only resets that financial clock from 2017, but actually puts us about $6 million ahead of that." (Hr'g Tr. 35:23-25; 36:1-14.)

[7] If approved by this Court, Receiver will then petition the federal court for approval, as is a prerequisite of settling a class action under the federal rules.

to the Code, the Court shall determine whether the proposed settlement is "fair, equitable, and in the best interest of the [receivership] estate." *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 640 (Bankr. S.D.N.Y. 2012); *In re Key3Media Group, Inc.*, 336 B.R. 87, 93 (Bankr. D. Del. 2005), *aff'd*, No. 03-10323 (MFW), 05-828-SLR, 2006 WL 2842462 (D. Del. Oct. 2, 2006). The decision to approve or deny a settlement "is within the sound discretion of the [] court[.]" *In re Robotic Vision Systems, Inc.*, Nos. NH 05-047, 04-14151-JMD, 2006 WL 929322, at *3 (1st Cir. B.A.P. 2006) (citing *Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995)).

Furthermore, the Court gives deference to a trustee's judgment, as a fiduciary of the estate, relative to a proposed settlement for which the trustee is seeking approval. *See In re Whispering Pines Estates, Inc.*, 370 B.R. 452, 460 (1st Cir. B.A.P. 2007) (citing *In re Moorhead Corp.*, 208 B.R. 87, 89 (1st Cir. B.A.P. 1997)); *see also In re 110 Beaver Street Partnership*, 244 B.R. 185, 187 (Bankr. D. Mass. 2000) ("[T]he Court will defer to the trustee's judgment and approve the compromise, provided the trustee demonstrates that the proposed compromise falls within the 'range of reasonableness' and thus is not an abuse of his or her discretion.").

III

Analysis

A

The PSA

The Court evaluates whether a proposed settlement is in the best interest of the estate by "'assess[ing] and balanc[ing] the value of the claim[s] that [are] being compromised against the value to the estate of the acceptance of the compromise proposal.'" *Jeffrey*, 70 F.3d at 185 (quoting *In re GHR Companies, Inc.*, 50 B.R. 925, 931 (Bankr. D. Mass. 1985)); *see also In re Boston & Providence Railroad Corp.*, 673 F.2d 11, 12 (1st Cir. 1982). The Court should not decide the

underlying issues of law or fact yet must be apprised of the facts necessary to properly evaluate the settlement. *See In re Dewey & LeBoeuf LLP*, 478 B.R. at 640-41; *see also In re Healthco International, Inc.*, 136 F.3d 45, 51 (1st Cir. 1998) (assessing whether the settlement "falls below the lowest point in the range of reasonableness"). In its determination of whether the proposal is in the best interest of the estate, the Court considers the following factors:

> (i) "the probability of success in the litigation being compromised;
> (ii) "the difficulties, if any, to be encountered in the matter of collection;
> (iii) "the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and,
> (iv) "the paramount interest of the creditors and a proper deference to their reasonable views in the premise." *Jeffrey*, 70 F.3d at 185 (*Jeffrey* Factors) (citing *In re Anolik*, 107 B.R. 426, 429 (D. Mass. 1989)).

1

The Probability of Success in the Litigation Being Compromised

First, the Court considers the viability of the claims, whereby a claim's weakness(es), defense's strength(s), or any circumstance that may present a "serious question" to the claim's viability, place doubt on an estate's "ability to prevail[,]" or jeopardize the best interest of the estate weigh in favor of settlement. *In re Anolik*, 107 B.R. at 430; *see also Jeffrey*, 70 F.3d at 187; *In re Healthco International, Inc.*, 136 F.3d at 52. The purpose of this consideration is to assess the risks and benefits of either proceeding in the litigation or entering into the proposed settlement to ensure that the receiver, as a fiduciary of the estate, has "'endeavor[ed] to realize the largest possible amount for assets of the estate.'" *Golden Pacific Bancorp v. F.D.I.C.*, 375 F.3d 196, 201 (2d Cir. 2004) (quoting *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir. 1946)).

Due to the weighty risks and costs involved in continuing with the litigation of the several pending and interrelated proceedings, all of which involve unique facts and novel and complex issues, the benefits of the PSA to the Plan and its participants outweigh the risks involved in proceeding with the litigation in an attempt to prevail at trial. The PSA presents an opportunity to fund the Plan with the net proceeds of the settlement without further dissipating the assets of the receivership estate in pursuit of claims, the viability of which are seriously questioned, and lawsuits, the finality of which are nowhere in sight.

For example, pursuant to the Hospital Conversions Act (HCA), the 2014 APA—between the Prospect Entities and CCCB, SJHSRI, and RWH—required and was granted approval from the Rhode Island Attorney General and Center for Health Systems Policy and Regulation of the Rhode Island Department of Health. (Pet. ¶ 63 (citing §§ 23-17.14-1, *et seq.*).) Under the 2014 APA, Prospect disclaimed liability for the Plan, and Plaintiffs in the Federal Action asserted that the APA was only approved based on inadequate and misleading information, such as Prospect having no liability for the Plan. *Id.* ¶¶ 62-63. Prospect Entities maintain their lack of responsibility for the Plan. In part, this contention led to the suit in the U.S. District Court and claims that the Plan was subject to ERISA at the time of the 2014 APA, making Prospect successor of and liable for the Plan under federal law, even in light of Prospect's express disclaimer to the contrary. *Id.* ¶¶ 66-67. Plaintiffs in the Federal Action sought to have the terms of the APA reformed to impose liability for the Plan on Prospect. *Id.*

This very issue is subject to a pending motion for summary judgment in the Federal Action; if the U.S. District Court were to grant Prospect's motion, any possibility for settlement and Plaintiffs' ERISA claims could be jeopardized. *Id.* ¶¶ 73-74. In addition, as raised in the Petition and stressed by the Liquidating Receiver and Special Counsel at the hearing on this matter,

granting Prospect's motion would have a domino effect on Prospect's claim for indemnity against CCCB and could significantly reduce, if not eliminate, the value of CCCB's Hospital Interests and any opportunity for CCCB to exercise its put option, which has been assigned in the PSA a presumed value of $4,000,000, with an additional $1,000,000 for other hospital interests. *Id.* ¶ 74; Hr'g Tr. 10:19-25; 11:1.

Pursuant to the PSA, a number of cases involving the settling parties will be dismissed; however, claims that may arise from breaches of the PSA, or from the Prospect Medical LOC or Prospect East LOC, will be preserved. As delineated by the Liquidating Receiver at the hearing, this PSA will resolve a substantial sum of the pension litigation, the controversies over CCCB's put option, *CCCB v. Lee* and the Delaware Action in their entireties, pending Medicare appeals concerning "retroactive adjustments to pre 2014 sale receivables[,]" and controversies with respect to the Category A Directors of PCC. (Hr'g Tr. 4:7-25.) The Settling Defendants will forgo claims against the Liquidating Receivership, amounting to a value of more than $3,000,000 and continually increasing. (Pet. ¶ 59; Hr'g Tr. 8:17-21.) Furthermore, the assets of the Liquidating Receivership, namely those of CCCB, RWH, and SJHSRI, which are not subject to the PSA, will continue to be available to the Receiver to bolster the Plan. (Pet. ¶ 59; Hr'g Tr. 11:1-5.) Finally, the Liquidating Receiver and Special Counsel, pursuant to the PSA, have withdrawn their objections to the administrative proceedings. (Pet. ¶ 56.)

On the other hand, if the parties were to pursue the ongoing cross-jurisdictional litigation, which remains highly contentious and without concession or compromise on any of the claims, a substantial sum of the funds that the Plan would recover pursuant to the PSA would likely be jeopardized through dissipation related to costs and expenses alone.

In weighing the pros and cons of the PSA, a possible danger—yet speculative—of settling the numerous claims, is that the Receiver is foregoing the ability to pursue claims and any possibility of recovering a greater amount if adjudicated through trial. However, "the proverbial bird in the hand is worth two in the bush." *In re Fox*, No. 03-60547 JPK, 2011 WL 10468085, at *9 (Bankr. N.D. Ind. Mar. 16, 2011); *In re Town, LLC*, No. 09-11827 SMB, 2009 WL 2883047, at *2 (Bankr. S.D.N.Y. July 27, 2009). With the viability of the Plaintiffs' claims uncertain, the Court finds that the first *Jeffrey* Factor weighs in favor of PSA as being in the best interest of the estate.

2

The Difficulties to be Encountered in Collection

To assess and balance the value of the pending claim against the value of the settlement to the receivership estate, the Court must consider whether there might be any difficulties in collecting the judgment. The Court looks to whether a defendant "has the ability to satisfy a judgment[,]" such as whether there are limited assets that will further deteriorate through litigation, *In re Aldrich*, 325 B.R. 493, 498 (Bankr. D. Mass. 2005), or whether a judgment creditor would need to maintain a separate action to collect, *In re Fibercore, Inc.*, 391 B.R. 647, 655 (Bankr. D. Mass. 2008) (considering the time and expense that would be required if necessary to pursue "additional legal action by the Trustee in a forum over 2,000 miles away" in order to collect on a judgment).

In the instant case, the Receiver expressed concern over Prospect's ability to satisfy its commitment under the PSA, which could only strengthen as the proceedings continue. Indeed, as any litigation ensues, assets that could contribute to settlement may deteriorate as costs of litigation increase. Naturally, continuation of the various proceedings and the associated costs could only

increase Receiver's concerns. Nevertheless, to mitigate against Receiver's concerns of risk involved in its ability to collect under the PSA, Receiver obtained advice of counsel on how to best structure the PSA and better secure Prospect's obligations thereunder. (Pet. ¶ 80.) Pursuant to this advice, JPMorgan Chase Bank, N.A. issued two LOCs to the Receiver. *Id.*

In addition, if the proceedings continued and bankruptcy became imminent, the Receiver or Liquidating Receiver's claims would likely need to be pursued in a distant forum. (Hr'g Tr. 19:19-23.) Thus, not only would a bankruptcy petition place any recovery that the Receiver might obtain for the Plan at risk, it would also increase the cost of pursuing any claims that already bear an uncertain recovery.

Because of concerns involved in the collection of a judgment—if one is to be obtained—and the risks involved in collection under the PSA have been considered and mitigated against, the Court gives deference to the Receiver's judgment that the benefits to the estate of settling outweigh the risks in collection and finds that the second *Jeffrey* Factor weighs in favor of PSA as in the best interest of the estate.

3

The Complexity of the Litigation Involved; the Expense, Inconvenience and Delay

The judgment of a fiduciary of an estate is given great deference in concluding whether the complexity of litigation, including its cost, inconvenience, and delay, weighs in favor of settlement. *See In re Kavlakian*, 403 B.R. 159, 162 (D. Mass. 2009). Where the likelihood that any recovery on the merits would be offset by costs and fees incurred in further pursuit of the litigation, this factor weights in favor of settlement. *See In re Beaver St. Partnership*, 355 F. App'x 432, 437 (1st Cir. B.A.P. 2009). In assessing the complexity and its potential costs, the court looks to the number of parties involved, the pendency of complex, intricate, or novel legal and factual

issues yet to be determined, *In re Anolik*, 107 B.R. at 430, and the history of the litigation, *In re Servisense.com, Inc.*, 382 F.3d 68, 72 (1st Cir. 2004).

Retired Chief Justice Frank J. Williams (C.J. Williams) presided over the PSA discussions, reviewed the progress of the disputes in all of the actions, and declared that "[m]any of the contentions advanced by the settling parties involve completely novel and unsettled issues of law." (Williams Decl. ¶ 6.) C.J. Williams found the litigation to be unique and complex, with more than a dozen defendants, "each of which Plaintiffs contend had liability for the shortfall in the funding of the Plan . . . [and] Defendants [who] deny any responsibility whatsoever." *Id.* ¶ 7. Based on his fifty years of experience, as a lawyer, judge, or mediator, C.J. Williams found this compilation of litigation to be "[o]ne of the most complex, if not the most complex, matters in which I have been involved in all my years as a lawyer, judge, or mediator." *Id.*

In relation to the "global settlement," the PSA requires the resolution of related claims in five judicial proceedings and two administrative proceedings. *Id.* ¶ 8. Each of these claims is complex. *Id.* ¶ 9. For instance, Plaintiffs asserted overlapping ERISA and state law tort claims against Prospect for failure to fund the Plan, breaches of fiduciary duty, fraudulent transfers, and derivative claims of the Plan, as the beneficial owner CCCB's minority interest in PCC. *Id.* In addition, Prospect asserted that the transfer of the Plan to them was invalid, claims no responsibility for the Plan, and contends that they should be indemnified for costs of litigation. *Id.*

In addition, the Receiver has expressed his judgment that the complexity of the factual and legal issues amongst the pending and interrelated cases warrant settlement rather than continuation. As exemplified in Section A, *supra*, the outcome of pending motions in the Federal Action could have a dire impact on the Plan's ability to recover or the Settling Defendants' willingness to entertain any settlement. Furthermore, the Receiver has opined that the facts and relief the

Plaintiffs seek in the Federal Action are unique and the legal issues under ERISA are issues of first impression. (Pet. ¶¶ 67-68.) Likewise, Plaintiffs' claims of fraud involve novel factual and legal issues. *Id.* ¶¶ 69-70. In *CCCB v. Lee*, fraudulent transfer claims against Lee and Topper are further complicated by a tolling agreement and are at risk in the event of Prospect's insolvency. *Id.* ¶ 75. Claims against Angell Pension—for professional negligence, breach of fiduciary duties, fraud, and misrepresentation—are stayed pending the outcome of the motion for summary judgment and involve novel legal issues. *Id.* ¶¶ 76-78.

Summarizing the complexity of the various pending lawsuits, Receiver stated that there have been, without inclusion of the administrative proceedings, "over 700 separate filings in the state and federal courts . . . total[ing] nearly 23,000 pages." *Id.* ¶ 72. The Receiver expects that the litigation of the Federal Action alone could take years to come to conclusion and could be further complicated by an insolvency proceeding of Prospect. Thus, further delay of resolution of these matters creates great risk to the Plan and its participants' ability to recover under the Plan.

The Court finds that the complexity of these interrelated cases, including the number of parties involved, the pendency of complex, intricate, and novel legal and factual issues, in addition to the potential costs in continuation of litigation, weigh in favor of the PSA as in the best interest of the estate.

4

The Paramount Interest of the Creditors: Namely, the Plan Participants

The Court also gives deference to the creditors' views and interests and considers whether there is wide scale support or resistance to the settlement. *In re Healthco International, Inc.*, 136 F.3d at 50. In the instant case, of concern are the views of the Plan participants. The Court has

received no objection; rather, the records suggest a wide scale support of the PSA on the part of the Plan participants.

Attorney Violet, who represents 285 Plan participants, states that she was "thoroughly briefed . . . on the pros and cons of [the] [S]ettlement" and declares that "the plan participants whom [she has] been advising wholeheartedly and unequivocally support Plaintiffs' Petition to proceed with the proposed settlement" and that, in her opinion, "the benefits to the Plan participants by increasing the assets of the Plan significantly outweigh any detriment[.]" (Hr'g Tr. 23:23-25; 24:1; Violet Decl. ¶¶ 2-3, 6, 8.) Similarly, Attorney Callaci, who is counsel for United Nurses and Allied Professionals which includes approximately 400 union members who are Plan participants, declares on behalf of those participants that "they fully trust and are confident in the Receiver's assessment that the settlement agreement is in the best interest of the receivership estate and the plan, and the plan participants[.]" (Callaci Decl. ¶¶ 1-2.) Likewise, Attorney Kasle, who represents 247 Plan participants, considers the PSA to be "reasonable and favorable to the interests of [his] clients[.]" (Kasle Decl. ¶¶ 3, 6.)

In light of the overall support for the PSA by the Plan participants, the Court finds that the fourth *Jeffrey* Factor weighs in favor of approving the PSA as in the best interests of the Plan participants. As a result of all four factors weighing in favor of approval, the Court finds that the PSA is fair, equitable, and in the best interest of the receivership estate.

B

Attorneys' Fees

In addition to the request for approval of the PSA, the Receiver also requests approval for the payment of attorneys' fees to the Special Counsel under the terms of the Retainer Agreement, which was previously approved by this Court.

On October 11, 2017, the Receiver sought leave from this Court, and the Court granted its Petition, to engage WSL as Receiver's Special Counsel. WSL was retained to "investigate potential liability or obligation of any persons or entities to pay damages or funds to the Plan" and make claims against those persons or entities. (Pet. Ex. G.) The Retainer Agreement provides that "[i]f 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." *Id.*

WSL engaged in pre-suit investigation for over eight months, filed two actions on behalf of the Receiver, and in August and November of 2018, entered into two settlement agreements, with a total gross recovery of $17,181,202.91. (Pet. ¶¶ 9-14.) With respect to the settlement in the Federal Action, the Court appointed a Special Master to make a recommendation concerning the attorneys' fees for the Special Litigation Counsel pursuant to the terms of the Retainer Agreement providing for 23 1/3 percent of the gross settlement amount. *Id.* ¶ 18. The Special Master recommended that the attorneys' fees be approved as they were consistent with the Retainer Agreement and below the benchmark of 25 percent of a common fund. (Pet. Ex. H, at 15-16.) The Special Master's analysis reviewed much of the subject matter set forth in Section III.A., *supra*, such as the complexity of the factual and legal issues and risks and duration of litigation, before concluding that the 23 1/3 percent of the gross of the settlement was reasonable. *Id.* at 14-15 (reviewing the seven "*Goldberger* factors" *infra*, to assess the reasonableness of the fees to be awarded in a settlement).

Not only were two prior settlements vigorously contested and favorably decided for the Plan, various intermediary proceedings were also zealously pursued. Still, as a result of the great

effort by the Special Counsel and all of the parties that came to the table, this PSA is now before the Court.

C.J. Williams opined that based on the Retainer Agreement that was approved by this Court and the substantial work and effort of WSL in litigating the federal and state court actions in order to reach a favorable settlement for the Plan "participants by increasing the assets of the Plan," the 23 1/3 percent of the PSA fund was reasonable. (Williams Decl. ¶ 13.)

In "common fund" cases, where any recovery will be attributed to a common fund for the benefit of a group of persons, the percentage-of-fund (POF) method to determining attorneys' fees is frequently imposed, based on reasonableness. *See, e.g., In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 305 (1st Cir. 1995). In choosing to apply the POF method over the lodestar approach, the court must exercise informed discretion. *Id.* at 306. The lodestar approach assesses "'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Sisto v. America Condominium Association, Inc.*, 140 A.3d 124, 129 n.7 (R.I. 2016) (quoting *In re Schiff*, 684 A.2d 1126, 1131 (R.I. 1996)).

As it would be impracticable to apply the lodestar approach under the circumstances of the "global settlement[,]" due to the vast amount of proceedings, parties, filings, and efforts of counsel, the POF method is not only reasonable but was previously contemplated by this Court when it approved the Retainer Agreement, including the amount of 23 1/3 percent of any settlement obtained. (Williams Decl. ¶ 8.) The POF method is "result-oriented"; thus, "'a showing that the fund conferring a benefit on the [Plan participants] resulted from'" Special Counsel's efforts is the Court's primary concern. *In re Thirteen Appeals*, 56 F.3d at 307 (quoting *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)).

Our Supreme Court has recognized that the "common fund exception" to the general American Rule, that all parties pay their own attorneys' fees, "'allows a court to award attorney's fees to a party whose litigation efforts directly benefit others[.]'" *McCulloch v. McCulloch*, 69 A.3d 810, 826 (R.I. 2013) (quoting *Blue Cross & Blue Shield of Rhode Island v. Najarian*, 911 A.2d 706, 711 n.5 (R.I. 2006)). However, the Court has not set forth a standard for determining what percentage of the common fund is reasonable. Nevertheless, in determining the reasonableness of the percentage of recovery that would be allocated to attorneys' fees, some courts have analyzed the following "*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 Marketing & Sales Practices Litigation*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (quoting *In re Lupron Marketing & Sales Practices Litigation*, No. MDL 1430, 01–CV–10861–RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2nd Cir. 2000))).

Other courts consider fewer factors, namely, "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved," and assign "the greatest weight to the benefit achieved in litigation." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012).

Because the *Goldberger* factors provide for a more thorough analysis, the Court adopts this approach to assess the request in the instant Petition. *See In re Neurontin*, 58 F. Supp. 3d at 170. Factors three and four—the complexity, duration, and risk of the litigation—are satisfied as provided for in Section III.A. *See id.* In addition, regarding factor two, due to the complex nature of this portfolio of litigation, it required highly skilled attorneys to investigate and pursue the various claims in the several forums and ultimately to come to the terms of the PSA that were

favorable to the Plan and its participants. *See id.* Furthermore, the Retainer Agreement that was approved by this Court contemplated that a percentage of the fund be utilized for attorney's fees, as the Court understood that in order to obtain the greatest outcome for the receivership estate, an hourly rate absent any reward would only further diminish the Plan. The POF method not only "enhances efficiency" but encourages efforts to get to the end game, albeit by settlement or otherwise, for the benefit of the estate. *See In re Thirteen Appeals*, 56 F.3d at 307 ("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.").

Regarding the first *Goldberger* factor—the size of the fund and the number of persons benefitting from it—the Plan has approximately 2,700 participants and the PSA contemplates that the net proceeds of the $30,000,000 will be contributed to further fund the Plan. *See In re Neurontin*, 58 F. Supp. 3d at 170. After deducting costs and expenses, including Special Counsel's 23 1/3 percent of the PSA amount, the net contribution to the Plan is approximately $23,000,000. According to the Receiver, this $23,000,000 contribution to the Plan will bring the Plan beyond its pre-Petition value, when Plan participants faced a forty percent cut in their benefits. Thus, all Plan participants will benefit from this substantial contribution to the fund.

This Court has presided over several of the interrelated lawsuits that are subject to the PSA. In the Plan Receivership alone, this Court has reviewed seventeen interim reports by the Receiver, all of which detailed the efforts of the Receiver and Special Counsel. Regarding the fifth *Goldberger* factor, the amount of time devoted to the various proceedings by the Special Counsel is—without question—extensive. *See In re Neurontin*, 58 F. Supp. 3d at 170.

Our Supreme Court has not articulated a benchmark percentage as a reasonable percentage for attorneys' fees in the recovery for a common fund; however, federal courts provide well-established instruction. *See In re Fleet/Norstar Securities Litigation*, 935 F. Supp. 99, 109 (D.R.I. 1996), supplemented, 974 F. Supp. 155 (D.R.I. 1997) ("In common-fund cases, the majority of attorney fee awards fall between 20% and 30% of the fund.") (citing *Camden I*, 946 F.2d at 774); *see also Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (utilizing 25 percent as the established benchmark). Many federal courts have looked to the benchmark of 25 percent of the recovery for a common fund as a reasonable percentage for attorneys' fees. *See In re Fleet*, 935 F. Supp. at 109; *see also Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 349 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015). Nevertheless, "the expectation is [also] that 'absent unusual circumstances, the percentage will decrease as the size of the fund increases.'" *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 187 (D. Mass. 1998) (quoting *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 256, n.63 (1986)).

If compared, however, to a contingency fee under Rhode Island law, in accordance with Rule 1.5 of the Supreme Court Rules of Professional Conduct, the fee must be reasonable according to the factors set forth in subsection (a).[8] R.I. Sup. Ct. R. Professional Conduct 1.5, cmt.

[8] Pursuant to Rule 1.5(a), "[t]he factors to be considered in determining the reasonableness of a fee include the following:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> "(3) the fee customarily charged in the locality for similar legal services;
> "(4) the amount involved and the results obtained;
> "(5) the time limitations imposed by the client or by the circumstances;

3. Many of these factors are reflective of the *Goldberger* factors. *See In re Neurontin*, 58 F. Supp. 3d at 170. Thus, the Court is confident that a POF in the amount of 23 1/3 percent of the gross recovery could be analyzed similarly under Rhode Island law and found to be reasonable.

In the instant Petition, Receiver is requesting that Special Counsel be compensated in accordance with the terms of the Retainer Agreement, in the amount of 23 1/3 percent of the gross recovery of $30,000,000, which is approximately $7,000,000. The Court finds that—in regards to the sixth *Goldberger* factor—Receiver's request is reasonable, (1) due to this percent being less than the 25 percent benchmark commonly considered; and (2) in light of (a) the percent requested being otherwise reasonable under the *Goldberger* factors; and (b) the opinion of C.J. Williams who presided over the mediation and stated that, the "request by WSL for an attorneys' fee in the amount of twenty-three and one-third percent (23 & 1/3%) of the $30,000,000 settlement fund, in accordance with their Court-approved fee agreement with the Plan Receiver, is reasonable and appropriate given the complexity of this matter and the significant relief recovered by WSL." Williams Decl. ¶ 13; *see also In re Neurontin*, 58 F. Supp. 3d at 170.

Finally, public policy favors settling under terms that provide a promising outcome for the Plan and its participants, certainly more so in light of the Plan's underfunded status, which gave rise to the receivership and resulted in an array of contentious disputes. Indeed, it was difficult to have foreseen that a mutual agreement by the numerous settling parties would be entered into after

> "(6) the nature and length of the professional relationship with the client;
> "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> "(8) whether the fee is fixed or contingent." R.I. Sup. Ct. R. Professional Conduct 1.5(a).

good-faith settlement negotiations, whereby there would be no objecting parties and also wide-spread support by the Plan participants.

Attorney Violet, on behalf of the Plan participants she represents, acknowledged the request for fees and "urge[d] the Court to approve the [PSA] (including attorneys' fees) . . . [as] [t]he settlement . . . is beneficial to [her] clients." (Violet Decl. ¶¶ 9-10.) In addition, Attorneys Callaci and Kasle expressed their support for approval of the PSA, including the attorneys' fees as requested by the Receiver. (Callaci Decl. ¶¶ 3-4; Kasle Decl. ¶ 7.)

As all parties are in agreement to the terms of the PSA and support the approval of attorneys' fees as requested, the Court cannot say that the approval of the PSA, including the request for attorneys' fees, is by any means against public policy. As such, the Court finds that the seventh *Goldberger* factor weighs in favor of approving the attorneys' fees as they have been requested by the Receiver. *See In re Neurontin,* 58 F. Supp. 3d at 170.

IV

Conclusion

After assessing the factors based on the issues presented in the Petition, the Court finds that the PSA is fair, equitable, and in the best interest of the receivership estate. In addition, the Court finds that the attorneys' fees are reasonable. Accordingly, the Court approves the PSA, pursuant to § 23-17.14-35 as a good-faith settlement, including Receiver's request to pay attorneys' fees to Special Litigation Counsel pursuant to the terms of the Retainer Agreement, in the amount of 23 1/3 percent of the gross settlement amount.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan, as amended
CASE NO:	C.A. No. PC-2017-3856
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 4, 2021
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	SEE ATTACHED
For Defendant:	SEE ATTACHED

St. Joseph Health Services of Rhode Island, Inc.
v.
St. Joseph Health Services Retirement Plan, as amended et al.
C.A. No. PC-2017-3856

COUNSEL OF RECORD:

St. Joseph Health Services of Rhode Island, Inc.
St. Joseph Health Services of Rhode Island Retirement Plan, as amended

- Richard J. Land, Esq.
  rland@crfllp.com

- George E. Lieberman, Esq.
  george@gianfrancescolaw.com

St. Joseph Health Services of Rhode Island Retirement Plan, as amended

- Richard J. Land, Esq.
  rland@crfllp.com

- George E. Lieberman, Esq.
  george@gianfrancescolaw.com

- Robert Fine, Esq.
  rfine@crfllp.com

Interested Parties:

Adler Pollock & Sheehan P.C.

- William M. Dolan, Esq.
  wdolan@apslaw.com

Mona Breault
Joan Brennan
Bonita DeLeo
Christine Dettore
Patricia Henry
Leo L. Levesque
Margaret Maymow
Mary Anne Plante
Lillian Sparfven
Joyce Specht
Luisa M. Viveiros
Elizabeth Zanfagna

- Arlene M. Violet, Esq.
  genvio@aol.com

Kathleen Brequet

- Jeffrey W. Kasle, Esq.
  jwk@olenn-penza.com

CharterCare Foundation

- Christopher K. Sweeney, Esq.
  csweeney@connkavanagh.com

Russell F. Conn, Esq.

- Scott F. Bielecki, Esq.
  sbielecki@cm-law.com

Thomas S. Hemmendinger, Esq.

- Thomas S. Hemmendinger
  themmendinger@brcsm.com

Office of Attorney General

- Maria R. Lenz, Esq.
  marialenz@riag.ri.gov

- Jessica D. Rider, Esq.
  jrider@riag.ri.gov

Prospect CharterCare, LLC

- Lynne B. Dolan, Esq.
  ldolan@hinckleyallen.com

- William M. Russo, Esq.
  mrusso@frlawri.com

Prospect Medical Holdings, Inc.

- Christopher J. Fragomeni, Esq.
  cfragomeni@shslawfirm.com

Rhode Island Federation of Teachers and Health Professionals

- Elizabeth A. Wiens, Esq.
  ewiens@rilaborlaw.com

Rhode Island Foundation

- David A. Wollin, Esq.
  dwollin@hinckleyallen.com

Roman Catholic Bishop of Providence

- Howard Merten, Esq.
  hmerten@psh.com

State of Rhode Island

- Neil F. X. Kelly, Esq.
  nkelly@riag.ri.org

The Angell Pension Group, Inc.

- Steven J. Boyajian, Esq.
  sboyajian@rc.com

United Nurses & Allied Professionals Local 5110

- Christopher Callaci, Esq.
  ccallaci@unap.org

Stephen F. Del Sesto

- Stephen F. Del Sesto, Esq.
  sdelsesto@pierceatwood.com

Receiver's Special Counsel

- Max Wistow, Esq.
  mw@wistbar.com

- Stephen P. Sheehan, Esq.
  spsheehan@wistbar.com

- Benjamin G. Ledsham, Esq.
  bledsham@wistbar.com

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	In re: CharterCARE Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital
CASE NO:	C.A. No. PC-2019-11756
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 4, 2021
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	SEE ATTACHED
For Defendant:	SEE ATTACHED

In re: CharterCARE Community Board,

St. Joseph Health Services of Rhode Island,

and Roger Williams Hospital

C.A. No. PC-2019-11756

Counsel of Record:

CharterCARE Community Board

- Richard D. Land, Esq.
  rland@crfllp.com

Stephen Del Sesto, Receiver for SJHSRI Retirement Plan

- Stephen F. Del Sesto, Esq.
  sdelsesto@pierceatwood.com

Counsel for Receiver, SJHSRI Retirement Plan

- Max Wistow, Esq.
  mwistow@wistbar.com

- Stephen P. Sheehan, Esq.
  spsheehan@wistbar.com

- Benjamin G. Ledsham, Esq.
  bledsham@wistbar.com

Peter F. Neronha, Attorney General of the State of Rhode Island,

in his capacity as Administrator of Charitable Trusts

- Jessica D. Rider, Esq.
  jrider@riag.ri.gov

Prospect East Holdings, Inc.

Prospect Medical Holdings, Inc.

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

- Christopher J. Fragomeni, Esq.
  cfragomeni@shslawfirm.com

- Douglas A. Giron, Esq.
  dag@shslawfirm.com

- John Tarantino, Esq.
  jtarantino@apslaw.com

- Patricia K. Rocha, Esq.
  procha@apslaw.com

Prospect East Holdings, Inc.

Prospect Medical Holdings, Inc.

- Joseph Avanzato, Esq.
  javanzato@apslaw.com

- Leslie D. Parker, Esq.
  lparker@apslaw.com

The Angell Pension Group, Inc.

- Steven J. Boyajian, Esq.
  sboyajian@rc.com

The Beacon Mutual Insurance Company

- Patricia Antonelli, Esq.
  pantonelli@smsllaw.com

Truk-Away Landfill Site PPP Group

- Giovanni La Terra Bellina, Esq.
  jlaterra@orsonandbrusini.com

Liquidating Receiver

- Thomas S. Hemmendinger, Esq.
  (401) 453-2300
  themmendinger@brcsm.com

- Ronald F. Cascione, Esq.
  rcascione@brcsm.com

- Lisa M. Kresge, Esq.
  lkresge@brcsm.com

- Sean J. Clough, Esq.
  sclough@brcsm.com