

STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss.

SUPERIOR COURT

CASE NO. 217-2020-CV-00026

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

(IN RE YDC AND YDSU LITIGATION)

PLAINTIFFS' MOTION TO ACCEPT SUPPLEMENTAL MEMORANDUM

State Defendants have moved to strike Plaintiffs' February 10, 2023 Supplemental Memorandum in Opposition to State Defendants' First and Second Motions to Dismiss. As described in Plaintiffs' contemporaneous opposition to that motion and in the Supplemental Memorandum itself, Plaintiffs submitted their Supplemental Memorandum after the Court raised questions at oral argument on State Defendants' Motions to Dismiss that were not squarely presented in those motions themselves, and which Plaintiffs therefore could not have addressed in briefing prior to oral argument. So as to dispense with any more gratuitous procedural bickering, Plaintiffs herewith move the Court to accept their Supplemental Memorandum as filed. In further support of this Motion, Plaintiffs state as follows:

1. As explained in the Supplemental Memorandum, Plaintiffs filed that memorandum to address issues that they did not anticipate, and could not reasonably have anticipated, in advance of the January 27, 2023 oral argument. Specifically, the Supplemental Memorandum (1) notified the Court of a new ruling from the New Hampshire Supreme Court that was issued after the oral argument; and (2) addressed questions concerning Plaintiffs' claim for breach of fiduciary duty

that were not implicated by State Defendants' moving papers but were raised for the first time by the Court, *sua sponte*, at the January 27, 2023 argument. *See* Supp. Memo. at 1-3.

2. State Defendants have conceded, in their Motion to Strike, that Plaintiffs' notification to the Court of the recent Supreme Court ruling was proper (and, perhaps, even ethically mandated). *See* Mot. to Strike at 3, ¶ 7 (citing N.H. R. Prof. Conduct 3.3(a)). The latter part of Plaintiffs' memorandum, which addresses potentially dispositive questions that State Defendants themselves did not think to in their motion to dismiss briefs, was also entirely proper. Having been given no notice that these questions were potentially dispositive, Plaintiffs had no opportunity to address them in their briefing before oral argument. They must be given such an opportunity before their claims are dismissed. *See, e.g., Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, (1st Cir. 2000) ("Courts must move cautiously when dismissing a complaint *sua sponte*. Although it is occasionally appropriate for a district court to note the inadequacy of the complaint and, on its own initiative, dismiss the complaint, a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue.") (internal quotation marks and citation omitted).

3. Plaintiffs therefore move the Court to accept their Supplemental Memorandum as filed on February 10, 2023. For the reasons stated in the foregoing paragraph, Plaintiffs should be afforded the opportunity to address the potentially dispositive questions raised *sua sponte* by the Court at oral argument before their claims are dismissed for reasons not raised by State Defendants in their motions. Plaintiffs further submit that the Court itself will benefit from thorough briefing on those questions, which will ensure that the Court is as fully informed as possible before rendering its decision on the pending motions.

4. Pursuant to Superior Court Rule 11(c), Plaintiffs have not attempted to obtain State Defendants' concurrence in this Cross-Motion because "it can be reasonably assumed that" Plaintiffs "will be unable to obtain concurrence."

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- a. Grant this Motion and accept Plaintiffs' Supplemental Memorandum as filed on February 10, 2023; and
- b. Grant such other and further relief as may be equitable and just.

Respectfully Submitted,

PLAINTIFFS,

By and through counsel,

NIXON PEABODY LLP

Dated: February 24, 2023

RILEE & ASSOCIATES, P.L.L.C.

/s/ Cyrus F. Rilee, III

Cyrus F. Rilee, III, Esq. (Bar No. 15881)

Laurie B. Rilee, Esq. (Bar No. 15373)

264 South River Road

Bedford, NH 03110

T: 603.232.8234

crilee@rileelaw.com

lrilee@rileelaw.com

/s/ Mark Tyler Knights

David A. Vicinanza, Esq. (Bar No. 9403)

W. Daniel Deane, Esq. (Bar No. 18700)

Mark Tyler Knights, Esq. (Bar No. 264904)

Kierstan Schultz, Esq. (Bar No. 20682)

Nathan Warecki, Esq. (Bar No. 20503)

Erin S. Bucksbaum, Esq. (Bar No. 270151)

Allison K. Regan, Esq. (Bar No. 272296)

900 Elm Street, 14th Floor

Manchester, NH 03101

T: 603-628-4000

dvicinanzo@nixonpeabody.com

ddeane@nixonpeabody.com

mknight@nixonpeabody.com

kschultz@nixonpeabody.com

nwarecki@nixonpeabody.com

ebucksbaum@nixonpeabody.com

aregan@nixonpeabody.com

CERTIFICATE OF SERVICE

I certify that on February 24, 2023, I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's e-filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case.

/s/ Mark Tyler Knights
Mark Tyler Knights, Esq.