

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PROVIDENCE, SC. SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF )  
RHODE ISLAND )

VS. )

C.A. NO. PC-2017-3856 )

ST. JOSEPH SERVICES OF RHODE )  
ISLAND RETIREMENT PLAN )

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON DECEMBER 18, 2017

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE.....RECEIVER  
STEPHEN SHEEHAN, ESQUIRE.....FOR THE RESPONDENT  
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL  
JESSICA RIDER, ESQUIRE.....FOR THE STATE  
KATHRYN ENRIGHT, ESQUIRE.....FOR THE STATE  
JOSEPH CAVANAGH, ESQUIRE,.....FOR PROSPECT CHARTERCARE  
ARLENE VIOLET, ESQUIRE.....FOR LILLIAN SPARVEN

GINA GIANFRANCESCO GOMES  
COURT REPORTER

C E R T I F I C A T I O N

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 65, inclusive, are a true and accurate transcript of my stenographic notes.

  
GINA GIANFRANCESCO GOMES  
COURT REPORTER

1 MONDAY, DECEMBER 18, 2017

2 MORNING SESSION

3 THE CLERK: Your Honor, the matter before the Court  
4 is PC-2017-3856, St. Joseph's Health Services of Rhode  
5 Island vs. St. Joseph Health Services of Rhode Island  
6 Retirement Plan. This matter is on for the Attorney  
7 General's Emergency Motion regarding Clawback and  
8 Prospect CharterCare's Emergency Motion to Intervene.  
9 Would counsel please identify yourselves for the record

10 MR. SHEEHAN: Good morning, your Honor, Stephen  
11 Sheehan for the Respondent, St. Joseph's Health Services  
12 of Rhode Island Pension Plan and Special Counsel.

13 MR. DEL SESTO: Good morning, your Honor, Stephen  
14 Del Sesto, Receiver of the Retirement Plan.

15 MR. WISTOW: Max Wistow, Special Counsel for the  
16 Plan.

17 MR. RIDER: Good morning, your Honor. Jessica Rider  
18 on behalf of the Department of Attorney General.

19 MS. ENRIGHT: Good morning, your Honor. Katie  
20 Enright for the Department of Attorney General.

21 MR. CAVANAGH: Good morning, your Honor. Joseph  
22 Cavanagh for Prospect CharterCare.

23 MS. VIOLET: Arlene Violet for Lillian Sparven, et  
24 al.

25 THE COURT: Thank you. We have on this morning the

1 Attorney General's motion as well as the Court received  
2 late Friday night a motion by Attorney Cavanagh to  
3 intervene and then a motion on a protective order. Just  
4 on the motion to intervene itself, are there any  
5 objections?

6 MR. WISTOW: No, your Honor.

7 THE COURT: Very good. The motion to intervene is  
8 granted, and during the course of the proceedings we will  
9 take up, if necessary, the other motions.

10 MR. CAVANAGH: Thank you, your Honor.

11 THE COURT: The Court has received two status  
12 reports and one supplemental report from the Attorney  
13 General's Office. Before we go to the motions, I just  
14 have some questions and some clarification, if I could,  
15 to the Attorney General's Office. First, counsel, with  
16 respect to the confidential documents, according to  
17 Prospect CharterCare's motion there is in excess of  
18 17,000 pages of documents. Is that correct?

19 MS. ENRIGHT: Your Honor, that sounds like a good  
20 estimate. I don't have an exact number.

21 THE COURT: Subject to the motions before the Court  
22 this morning, are those documents ready to be transmitted  
23 to Special Counsel?

24 MS. ENRIGHT: Yes, your Honor. We have 1,500  
25 documents in the box beside Ms. Rider and we have 3,000

1 prepared to go over later today and both of those boxes  
2 contain mostly confidential documents.

3 THE COURT: I guess, just to make sure, and I  
4 understand we have a motion before the Court also, but  
5 does that encompass all of the documents that were deemed  
6 confidential by the Attorney General of the hospital  
7 conversion?

8 MS. ENRIGHT: No, your Honor, there are many more  
9 documents that were deemed confidential by the Attorney  
10 General. These are just two boxes that do contain  
11 confidential documents.

12 THE COURT: I guess my question is you are not  
13 prepared to turn over all of the documents deemed  
14 confidential under the hospital conversion?

15 MS. ENRIGHT: Correct.

16 THE COURT: So what is the timeframe for the rest of  
17 the stuff?

18 MS. ENRIGHT: So we have been receiving documents  
19 from War Room. They are the vendor we hired to assist us  
20 with copying the documents and organizing them and  
21 preparing them for our document review. We are expecting  
22 another five boxes today and we are preparing to send  
23 over additional boxes today. Once those boxes come in  
24 today, we will review them and get them out as soon as  
25 possible.

1 THE COURT: I just want to make sure I have this  
2 clear. There is not a separate box of the confidential  
3 documents that were filed with the application?

4 MS. ENRIGHT: No, your Honor. The first production  
5 set that consisted primarily of publicly available  
6 documents was just the first set.

7 THE COURT: I'm asking a different question. I  
8 understand you have produced a lot of boxes so far.  
9 There are confidential documents, 17,000 pages or so. My  
10 question is have those confidential documents been  
11 scanned in by War Room?

12 MS. ENRIGHT: Some have been and they continue to be  
13 worked on by War Room. We have about 15 to 20 boxes that  
14 we are still awaiting receipt of.

15 THE COURT: What would it take to expedite and just  
16 scan in 17,000 or so pages of confidential documents?

17 MS. ENRIGHT: They are not always separated. They  
18 are not always separated from what is publicly available.  
19 As we review a box, we are reviewing publicly available  
20 documents and confidential documents.

21 THE COURT: So if I was to say I want to go through  
22 the boxes and just pull out the documents deemed  
23 confidential by the Attorney General under the Hospital  
24 Conversion Act, scan those in so they can be turned over  
25 with however the Court rules on the current motion, what

1 is that going to take to do?

2 MS. ENRIGHT: Well, logistically we have to get the  
3 boxes back from War Room. I don't know what stage they  
4 might be in. If the confidential documents hadn't been  
5 scanned in by War Room yet and we undertook that task, we  
6 would have to pull out the confidential documents from  
7 the publicly available documents. That would just be a  
8 matter of taking the time to pull them.

9 THE COURT: Okay. And I guess my last question,  
10 and, counsel, I will hear from you after. I just want to  
11 understand. So they're not organized in a way that all  
12 the confidential documents that are submitted are  
13 together inside of the boxes. I understand what you're  
14 saying. They're kind of spread through the different  
15 boxes.

16 MS. ENRIGHT: Yes, your honor. There will be boxes  
17 that contain only publicly available or only confidential  
18 based on the way they were submitted to us through the  
19 transacted parties. But I would say that it is more  
20 commonly going to be found that there is a mix of  
21 publicly available and confidential documents together.

22 THE COURT: So, I guess, you talked about the status  
23 with War Room, which I very much appreciate you hired an  
24 outside vender. In complex litigation, the Court has had  
25 some very good experience with the firm itself. So where

1 are they at in terms of the universe of documents in  
2 terms of bate stamping and scanning?

3 MS. ENRIGHT: Last week, I want to say on Wednesday,  
4 they returned to us ten original boxes and five  
5 additional boxes that had been bate stamped and we, as I  
6 said, are expecting five more. We're working with a  
7 total of thirty, so we are about halfway.

8 THE COURT: Okay. And do you know what the  
9 timetable is of these right now to have the other half?

10 MS. ENRIGHT: We have an e-mail into War Room. I  
11 e-mailed them Friday night and we have a call into them  
12 from this morning to get more information about the  
13 status of the delivery we are expecting today.

14 THE COURT: Is it in addition to the ten or is it in  
15 addition to the 15?

16 MS. ENRIGHT: This will be in addition to the ten.

17 THE COURT: So we will still have 15 waiting to hear  
18 from War Room?

19 MS. ENRIGHT: Correct.

20 THE COURT: And from the documents that you received  
21 so far, the ten boxes, where do they stand in terms of  
22 review for privilege?

23 MS. ENRIGHT: So as the status report addressed, +1  
24 we handed over 9,000 last week and we are in the process  
25 at our office and in reviewing whatever boxes have been



1 received from War Room. We have a conference room full  
2 of boxes and document reviewers and they are working on  
3 it as we speak. We have the 1,500 pages in this box and  
4 3,000 additional pages in a box to go over this  
5 afternoon. That will leave us with three more boxes to  
6 get over, which I think we can do by mid or end of this  
7 week.

8 THE COURT: Okay. So seven of the boxes you have  
9 gone through, as far as privilege review, there is three  
10 just based on what we have right now?

11 MS. ENRIGHT: Yes.

12 THE COURT: Have you prepared a privilege log?

13 MS. ENRIGHT: Yes, your Honor, we have privilege  
14 logs. There were three documents identified in the  
15 privilege log that we sent over last week. We have  
16 confidentiality logs in addition to the confidential  
17 labeling of each confidential will be put on the  
18 particular document. So the confidentiality log will  
19 identify and describe the documents and the bate stamp  
20 pages that War Room put on the documents will be cited.

21 THE COURT: When you're saying the confidentiality  
22 log, those are the documents that were deemed  
23 confidential under the hospital conversion?

24 MS. ENRIGHT: Correct.

25 THE COURT: We have a list of those and as of right

1 now because we have a pending motion, those are ready to  
2 go but haven't been turned over at this point?

3 MS. ENRIGHT: That's correct. We are prepared to  
4 turn them over to Mr. Wistow today.

5 THE COURT: Okay. If you can just let me know in  
6 terms of scope on the privileged documents that you're  
7 taking a position are privileged at this point. The  
8 three categories that you spoke about in an earlier  
9 motion, was deliberative process, work product, and  
10 attorney/client. Can you give me an idea in terms of the  
11 number of pages of documents or scope so I can understand  
12 where those fit in?

13 MS. ENRIGHT: As the Court is aware, we did produce  
14 publicly available documents. As we move into the next  
15 phase of boxes, we are finding more privileged and more  
16 confidential documents. To give the Court an idea --

17 THE COURT: I'm not as concerned about the  
18 confidential that we're addressing here and we already  
19 addressed. It's really the privileged that I would like  
20 to understand a little more.

21 MS. ENRIGHT: I can tell you that it looks like  
22 maybe a quarter of a full box of the two or three or four  
23 boxes that we have the attorneys in right now that we  
24 were looking to claim privilege for, maybe a quarter of  
25 those documents.

1 THE COURT: I guess you have gone through seven at  
2 this point, boxes?

3 MS. ENRIGHT: Yes.

4 THE COURT: I'm not even looking for getting the  
5 numbers. Are most of them deliberative process, work  
6 product, attorney/client?

7 MS. ENRIGHT: I would say most are work product and  
8 deliberative process but primarily work product.

9 THE COURT: So the privilege logs, I don't want to  
10 get the wrong -- so we have privilege logs for seven  
11 boxes. There was something in your papers that talked  
12 about through 3,031, I assume, that is page numbers.

13 MS. ENRIGHT: Yes. So this box, for example, your  
14 Honor, only has a confidentiality log. There is no  
15 privilege log for this box. But there are a couple of  
16 pages of confidential documents that have been logged.  
17 The box we have prepared this afternoon there is no  
18 privilege log; correct? There is. Oh, it has two  
19 entries. Two entries on the box this afternoon. The  
20 majority of the box is confidential.

21 THE COURT: In your report it talks about 3,000 or  
22 so pages of documents that are subject to the privilege  
23 log. Is that confidential documents as well as  
24 privilege?

25 MS. ENRIGHT: The status?

1 THE COURT: Yes, looking at the status report.

2 MS. ENRIGHT: Your Honor, I just noted there are  
3 only three pages of those 3,000 documents. I just wanted  
4 to identify that box four does have a privilege in it.  
5 Only three documents have been identified and we are  
6 claiming privilege four of that 3,000.

7 THE COURT: So how many documents have been  
8 identified as confidential?

9 MS. ENRIGHT: In our production so far three  
10 documents.

11 THE COURT: You said there are several ones that you  
12 have gone through that haven't been produced. Are there  
13 others or are we talking about the three documents and  
14 seven boxes?

15 MS. ENRIGHT: This afternoon we will produce a  
16 privilege log for the box we are preparing to send over  
17 to Mr. Wistow's office. That box will have a privilege  
18 log with two entries on it.

19 THE COURT: Okay. I appreciate the clarification.  
20 When I saw that, at least bates stamp number I thought it  
21 it was on the thousands of documents.

22 MS. ENRIGHT: No, your Honor. We can make it clear  
23 next time. We wanted to demonstrate there is a privilege  
24 log in that box.

25 THE COURT: What would be helpful is in the future

1 status report if you can break down, I know there may be  
2 some that overlap, the deliberative process, work  
3 product, and attorney/client. So just so I understand in  
4 terms of scope. Okay. So what has been produced?

5 MS. ENRIGHT: At this point we have produced the  
6 four boxes and a response to request number five to Mr.  
7 Wistow's subpoena.

8 THE COURT: And we talked about what has not been  
9 produced. There is additional documents that are being  
10 worked on and will be produced as we get the boxes we're  
11 still waiting to get scanned in?

12 MS. ENRIGHT: Yes.

13 THE COURT: In terms of documents, I'm not talking  
14 about electronic, have we identified the scope of what we  
15 have in your office?

16 MS. ENRIGHT: Yes.

17 THE COURT: Let's talk about electronic documents.  
18 Your I.T. have been involved. There has been some  
19 discussion. Have we identified what type of electronic  
20 media?

21 MS. ENRIGHT: Yes, your Honor, and we are preparing  
22 to report to the Court on Thursday further on the  
23 electronic discovery. The process that is being  
24 undertaken right now is that authors or the producers are  
25 being identified, people who worked on these conversions.

1 We are searching through their documents. Many of these  
2 people are no longer working at the Attorney General's  
3 Office. We have been able to grab those archives files  
4 and they are being searched. For people who continue to  
5 work at the office who have worked on these matters,  
6 those will be searched as well.

7 THE COURT: And so have there been searches that  
8 are conducted at this point?

9 MS. ENRIGHT: Yes.

10 THE COURT: One of the things that was in your  
11 motion the last time, I have asked you to meet and  
12 confer. You worked on search terms and I think you may  
13 have touched on that in your last report that was filed.  
14 Can you tell me where that is at this point?

15 MS. ENRIGHT: There were search terms suggested by  
16 Mr. Wistow's office. We have used some of those  
17 suggested search terms to refine and to develop the  
18 search that we conduct in our office. For example, where  
19 Mr. Wistow's office may have suggested that we use the  
20 transacted parties or the hospital, we found it might be  
21 useful to use another keyword in connection with the name  
22 of a hospital.

23 THE COURT: I guess we had that years ago when I was  
24 helping respond to the lead paint requests. Okay. I  
25 appreciate it. I have read through the reports and I

1 just wanted to kind of clarify where we are. I guess the  
2 only thing is Attorney Wistow raises the issue in terms  
3 of the production so far in terms of the order of  
4 documents and the tabs.

5 MS. ENRIGHT: I don't really know what he's  
6 referring to.

7 THE COURT: I'll give him the opportunity.

8 MS. ENRIGHT: We found that we get a duplicate box  
9 for every box we review and send out and we found that  
10 it's very well organized. Where the original file has  
11 tabs in it, War Room has put a page there to separate  
12 indicating that there is some divider, some tab, maybe a  
13 file. So if the frustration is with blank pages, they  
14 are really acting as substitutes for the dividers that  
15 existed in the original.

16 THE COURT: Thank you so much. Counsel, do you wish  
17 to be heard on the status?

18 MR. WISTOW: Yes, I do, your Honor, just briefly.  
19 What we have so far is bland assurances with compliance.  
20 I don't want to drag this out because there is two  
21 motions to be heard.

22 THE COURT: I understand that.

23 MR. WISTOW: For example, we pointed out on November  
24 29th, which is verging on a month ago, that the list of  
25 confidential documents included three specifically

1 relating to the pension plan, one, an evaluation of the  
2 pension plan, a supplement to that, and a financial  
3 supplement to the pension plan. As far as I know, we  
4 don't have those and those are probably the single most  
5 obvious things we need. It sounds like we're going to  
6 get a complete document dump that we're going to just be  
7 squandering our time. I would like to inquire through  
8 the Court when can we get at least those documents that  
9 specifically relate to the pension plan which are held to  
10 be confidential?

11 THE COURT: I appreciate that. What I'm trying to  
12 understand is we talked about rolling production, we  
13 talked about documents, but we also talked last time in  
14 terms of priorities. In fact, last time we talked about  
15 we were starting with '09 and then going up to '14. It  
16 seems like that has been rejiggered. I imagine you want  
17 the confidential documents.

18 MR. WISTOW: Absolutely.

19 THE COURT: What else in terms of priority? Again,  
20 because we can rejigger how this is working to get you  
21 the documents.

22 MR. WISTOW: Everything relating to the 2014  
23 conversion, but the priority with regard to that is the  
24 confidential documents. I know the confidential  
25 documents, the most obvious priority are the ones that

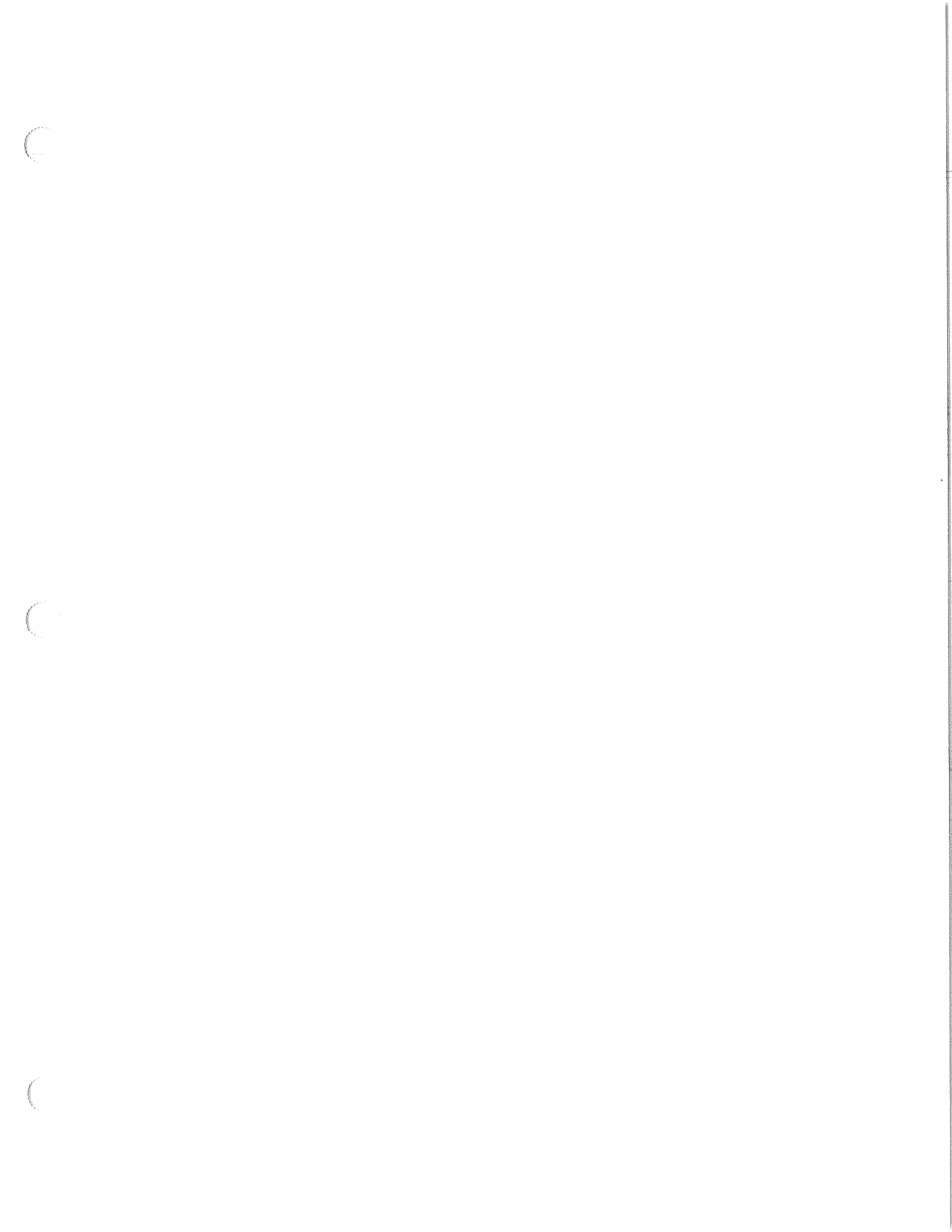


1 are specifically identified on the confidential list is  
2 relating to the pension plan.

3 THE COURT: Thank you, counsel. Let's move on now  
4 to the motions that are before the Court. Why don't we  
5 begin with the Attorney General's Office. Counsel.

6 MS. ENRIGHT: Thank you, your Honor. To begin I  
7 would just like to provide the Court with some background  
8 so your Honor can understand how we got to where we are  
9 today with our proposal for a clawback. First, your  
10 Honor, orders were presented addressing and protecting  
11 certain substantive matters relating to document  
12 production including the case management plan for E.S.I.  
13 and a confidentiality order protecting the substantive  
14 acts of our production of legally protected documents.  
15 Neither of those orders provide for a defined process to  
16 address in inadvertently disclosed documents which we  
17 believe is essential given the large scale of document  
18 production here.

19 On Tuesday of last week we proposed a joint clawback  
20 stipulation with Special Counsel. In response we  
21 received a statement that the clawback conflicted with  
22 the confidentiality order. We asked Mr. Wistow's office  
23 to identify that conflict so that we could address it and  
24 I invited them to give us a call to move things along.  
25 On Tuesday at 4:30, and our deadline to file the status



1 report was fast approaching, so we filed our status  
2 report and indicated that we were engaged in discussion  
3 with Special Counsel regarding the clawback and we were  
4 prepared to deliver a large document production including  
5 four boxes in response to request number five of the  
6 subpoena.

7       Thereafter, we received additional communications  
8 from Mr. Wistow's office objecting to certain terms of  
9 the clawback. We receive e-mails and voice mail messages  
10 which also said that the status report was misleading  
11 because Special Counsel was not negotiating a clawback as  
12 he believed that one was not necessary. Special Counsel  
13 also said our report did not make clear that we had not  
14 yet produced the four boxes and the response to request  
15 number five.

16       So first thing Wednesday morning we delivered 9,000  
17 pages of documents to Special Counsel and advised Special  
18 Counsel that we would be filing a supplement to our  
19 status report reflecting our production and our need to  
20 file a motion to establish a process to deal with the  
21 inadvertently disclosed documents because we could not  
22 reach agreement. On Wednesday afternoon we filed that  
23 motion that is before you today, your Honor. Just before  
24 noon on Thursday, Mr. Wistow's office e-mailed me  
25 acknowledging the differences in the confidentiality

1 order and the clawback. Upon his request we sent a Word  
2 version and we spent two days exchanging two versions of  
3 redlines. The Attorney General tried to resolve the  
4 issues raised by Special Counsel. On Friday afternoon we  
5 received Special Counsel's response that is filed with  
6 the Court.

7 I think there are two issues that are problematic  
8 for Special Counsel in this clawback, your Honor. I  
9 would like to take the first one, which is notification.  
10 Special Counsel complains that we are asking that they do  
11 our work for us. This is simply not the case. We are  
12 requesting that Special Counsel recognize the complex  
13 nature of the document review and work collaboratively  
14 with us in the event that Special Counsel recognizes or  
15 identifies a privilege or a legally protected document  
16 that has been inadvertently disclosed.

17 The simple process we are seeking would then require  
18 Special Counsel to give us a call notifying us of their  
19 discovery. We could address it then and there in an  
20 expeditious manner minimizing any need for Court  
21 intervention. Legally protected materials in this  
22 production include documents deemed confidential during  
23 the H.C.A. process as well as documents containing  
24 information subsequently deemed confidential. So this  
25 means our document reviewers are tasked with identifying

1 confidential even before a formal request and designation  
2 of confidential status may have been made. Special  
3 Counsel's cooperation in notifying the Attorney General  
4 of an inadvertent disclosure is not reasonable given the  
5 large scale document production and the short timeframe  
6 to conduct our review, the number of reviewers we have  
7 working on this. But it also recognizes the role of the  
8 Attorney General who is bound by statute to protect these  
9 confidential documents that are provided to us in our  
10 capacity as a regulatory party from third parties. These  
11 are not our documents.

12 THE COURT: Counsel, just a question. You use the  
13 word confidential documents. Counsel is getting the  
14 confidential documents under a protective order?

15 MS. ENRIGHT: Correct.

16 THE COURT: I'm just trying to understand where is  
17 the inadvertent disclosure?

18 MS. ENRIGHT: If we disclose it without properly  
19 identifying it as confidential, we have inadvertently  
20 disclosed it without marking it as a confidential.

21 THE COURT: So if you disclose something and don't  
22 mark it, the argument is it's outside the protective  
23 order.

24 MS. ENRIGHT: Exactly. We are not asking for  
25 Special Counsel to conduct any affirmative inquiry in to

1 the status of the document. We're asking for  
2 collaboration so that issues can be addressed in an  
3 orderly expeditious manner, again minimizing the need for  
4 court intervention. Special Counsel has also complained  
5 about the exclusion of E.S.I. in the clawback. This  
6 matter involved a significant amount of information that  
7 will be provided in both hardcopy and E.S.I. Much of it  
8 will be duplicitous. We propose a uniform approach to  
9 both categories of information. The procedure we propose  
10 provides a timeframe that the general rules does not so  
11 that E.S.I. and hardcopy documents are addressed  
12 consistently and expeditiously.

13 I just want to briefly address a few points in Mr.  
14 Wistow's objection and one of them relates to what we've  
15 already discussed, which is document protection. Special  
16 Counsel has criticized the Attorney General for producing  
17 a high volume of publicly available documents, which is a  
18 surprising position given how insistent Special Counsel  
19 was that the Attorney General produce all publicly  
20 available documents and everything.

21 In his motion to compel Special Counsel argued that  
22 publicly available documents must be produced by the  
23 Attorney General because Special Counsel obtaining them  
24 independently "placed an immediate undue burden on the  
25 Receiver and would confuse further proceedings in this

1 case." We are just doing what he asked for and complying  
2 with the subpoena.

3 With regard to the bad faith accusations that have  
4 been made, we have a team of attorneys next door working  
5 in a conference room carefully and quickly reviewing  
6 documents that we will produce as expeditiously as  
7 possible. We have produced 9,000 pages, and as I have  
8 described, we have 4,500 pages to go today. The Attorney  
9 General has no motivation to cause delay. We intend to  
10 meet the January 5th deadline imposed by the Court. Your  
11 Honor, we ask that you approve the procedure --

12 THE COURT: You took ten days off your deadline.

13 MS. ENRIGHT: I said January 15th.

14 THE COURT: January 5th, you said.

15 MS. ENRIGHT: Oh, no. I ask that your Honor approve  
16 the procedure proposed by the Attorney General.

17 THE COURT: I guess what I'm trying to understand  
18 is with respect to the E.S.I., the Supreme Court just  
19 amended the rule. The inadvertent disclosure paragraph  
20 in the order references the rule. I don't have a problem  
21 if it will be amended specifically to cite certain rules.  
22 I'm trying to understand because it doesn't have a number  
23 of dates.

24 MS. ENRIGHT: We think that the necessity comes from  
25 the notification piece that would follow our learning of

1 an inadvertently disclosed document. We then have a  
2 procedure in place to immediately address it instead of  
3 this coming up later in a court hearing where then the  
4 Attorney General has to receive notification that way and  
5 address it then. In that context it would just cause  
6 delay. If we're notified once this is suspected, that  
7 process that we're proposing would provide for a short  
8 ten-day timeframe, we would identify the document in a  
9 confidentiality or privilege log, and move forward.

10 THE COURT: Thank you very much. Counsel.

11 MR. SHEEHAN: Thank you. Good morning, your Honor.  
12 The Attorney General here is asking that the Court enter  
13 as an order a procedure for clawback of inadvertently  
14 produced documents. Obviously, that's what we're talking  
15 about here. Before we get to the merits of that, it's  
16 important to consider the context in which this request  
17 is made. Our subpoena is served on November 3rd.  
18 Production is due two weeks later on November 17th. No  
19 documents at all were received from the Attorney General  
20 until December 13th, so that's 40 days. It took 40 days  
21 to give us stuff that is publicly available. The  
22 documents that were produced are all publicly available  
23 with the exception of a couple of e-mails that identify  
24 that the A.G. had the receivership petition ten days  
25 before it was filed, and they have indeed acknowledged



1 that and said from that time they were working on  
2 identifying responsive documents. So they, by their own  
3 status report to this Court, have said they've been  
4 working on this since August 9th.

5 Now, Mr. Wistow pointed out that what hasn't been  
6 produced is the expert report analyzing and evaluating  
7 the pension plan, information relating to the employee's  
8 retirement plan, the financial supplement to pension  
9 information provided previously. That was identified at  
10 the hearing on November 27th, and specifically said both  
11 that it's very unlikely to be confidential. It pertains  
12 to the pension plan. Also, it's very relevant to the  
13 receivership. There is no excuse for us not having that  
14 document the next day, much less we still don't have it  
15 now.

16 Now, really we have no progress at all in obtaining  
17 documents from the A.G. The documents they have  
18 produced are all on their website, and, yes, ultimately  
19 we need from them all the documents that were publicly  
20 made available because that's the only way we can be sure  
21 of what was on their website. But that is by definition  
22 the last of the priority, and that has been clear from  
23 the outset.

24 So we requested production on November 17th. What  
25 happened? The day before we get an objection. So that's

1 the first legal intervention, and then on the 17th we  
2 have to file a motion to compel with a memo. That's the  
3 second. Then they object to the motion to compel on  
4 November 27th. That's the third. Then we have a reply  
5 to that objection on the 28th. That's the fourth. Then  
6 we have a hearing on November 29th, and your Honor there  
7 is 57 pages of transcript, as the court reporter is well  
8 aware. That was a very extensive hearing. And the Court  
9 decided the issues and directed the parties to agree on  
10 the wording of the orders.

11 Well, then between November 29th when the Court made  
12 that direction to the parties and December 7th when the  
13 orders were submitted, there was this back and forth five  
14 and six times between the parties to work out the terms  
15 of the orders and then we submitted three proposed orders  
16 on December 7th. We're up to, I think, ten now actions.  
17 And then on December 12th we have this -- actually, I  
18 skipped one. We have the first status report. That's  
19 makes 11. On the 12th we have the second. That's 12.  
20 On the 13th they amend their status report. That's 14.  
21 Documents first produced on the 13th of December.

22 We have 15 actions by counsel for Special Counsel  
23 and the A.G.'s office. Over 20 tasks, if you take all  
24 the back and forth that was involved, taking 50 days,  
25 probably over a hundred hours of lawyer time. I know

1       it's 50 hours, your Honor, from my office. \$20,000 in  
2       attorney fees from my office to accomplish nothing. And,  
3       your Honor, this is not a litigation between multimillion  
4       dollar corporations. \$20,000 represents some pension for  
5       some nurse for the rest of her life, and it's coming out  
6       ultimately, potentially, unless we're successful in  
7       supplementing the corpus, the raise, it's coming out of  
8       the pension fund.

9               Now, what is the Court to do? Well, what we would  
10       ask the Court to do to keep this moving is to deny the  
11       A.G.'s motion as, first of all, untimely. We went  
12       through this elaborate dance to get to orders which  
13       involved the negotiations back and forth. That was the  
14       time, if they were unhappy with the absence of any more  
15       specific provisions concerning inadvertent disclosures  
16       that are set forth in those orders. And to be clear,  
17       those orders deal with inadvertent disclosures. So  
18       parties dealing in this matter have to act efficiently  
19       and with some sense of urgency and that's the A.G. and  
20       that's all of the other parties against whom we served  
21       subpoenas. And we would ask that the Court make it clear  
22       to all of those parties that efficiency will be rewarded  
23       and inefficiency will not. Inefficiency will be rejected  
24       as untimely.

25               Now, the second reason to reject their motion, your

1 Honor, is it does put the burden on us to do their job.  
2 If you look at their proposed order, paragraph two, both  
3 Special Counsel and the Attorney General maintain a duty  
4 to promptly notify each other in the event it is  
5 discovered that a privilege or otherwise legally  
6 protected document or E.S.I. may have been inadvertently  
7 disclosed. Paragraph three has the same reference. It's  
8 one thing, your Honor, to ask for a claw pack, and as  
9 your Honor pointed out, the rule on E.S.I. has a  
10 clawback. It's another to ask the recipient to do the  
11 job for the party who makes the inadvertent disclosure.  
12 Notably, the rule on E.S.I. does not do that. It puts  
13 the burden on the party making the claim.

14 Your Honor, why does it do that? Because in order  
15 to know whether a document is possibly privileged, and  
16 that is the language they use, may be privileged, you  
17 have to know the status and identity of who sent it. You  
18 have to know the status and identity of who received it.  
19 You have to know whether other parties received copies so  
20 as to waive any claim of privilege. You have to know  
21 whether it was intended by the parties for the  
22 communication to be confidential, if we're talking about  
23 attorney/client for example. You have to know whether  
24 the A.G. when they produced it, did so intentionally  
25 recognizing that they're waiving a privilege but for

1 tactical reasons they saw a benefit.

2 I have been litigating for many years, as has the  
3 A.G., and privileged documents are very frequently given  
4 understanding there is a waiver with respect to that  
5 document and in some case with respect to the subject  
6 matter. Now, who can make all of those determinations?  
7 Us, the recipients of the document. But they say we  
8 retain a duty to promptly notify them in the event  
9 privilege documents may have been produced.

10 Your Honor, this is a court order ultimately, a  
11 court order violation, which is going to expose the  
12 violator to many sanctions including contempt. We take  
13 court orders very seriously. One of the problems here is  
14 the Attorney General's office does not. They went  
15 through this whole - I hate to use the phrase but it's  
16 only from the way they acted - rigmarole to get into this  
17 entry of the orders that were submitted on December 7th  
18 without raising this issue. They apparently didn't  
19 consider it significant enough to put it in the order  
20 that they would be agreeing would be entered by this  
21 Court. I guess they don't feel that the orders of this  
22 Court have any effect to come in here and ask for  
23 something more. Well, there is a time and a place and  
24 the time and the place is before the Court is involved,  
25 57 pages of transcript, et cetera, et cetera, et cetera.

1           Now, my sister talked about the procedure whereby  
2 they proposed this proposed procedure to us and she  
3 referred to Mr. Wistow's office. She might have referred  
4 to me, your Honor. And what happened was they sent us a  
5 proposed procedure on December 12th, the day they were  
6 going to give us the document or the day before, your  
7 Honor, and we responded at that time. It was even worse  
8 in terms of what it asked for us to do in terms of  
9 notifying them. We pointed that out. We pointed out  
10 that the rules on E.S.I. already contained a clawback,  
11 that including E.S.I. in their order was completely  
12 unnecessary, and we pointed out that it was all untimely.

13           And then, your Honor, we proposed a compromise. We  
14 said we don't think you have a right to this, we don't  
15 think it's necessary, but if you want an order on  
16 clawback, give us some documents, please. Keep this  
17 thing moving. Give us the five boxes of documents you  
18 talk about in your second status report, and we sent them  
19 the revised order, which did not contain obligations on  
20 us to which they responded, no good. We are going to  
21 stick with our proposal with respect to obligations on  
22 you and here we are today.

23           Now, your Honor, the conclusion, the A.G. has acted  
24 unreasonably, putting this obligation on us. The A.G.  
25 has been dilatory and this is in a proceeding where

1 pensioners cannot award dilatory tactics. We ask the  
2 Court to send a message to the A.G., to all parties that  
3 unreasonable and dilatory tactics are unacceptable.  
4 There will be consequences because, your Honor, we have  
5 an investigation. We have a job to do. We're not  
6 retained to spin our wheels. For us to be efficient our  
7 subpoenas have to be acknowledged as something that  
8 should be complied with. The court orders have to be  
9 acknowledged as something that should be complied with.

10 Your Honor, I am prepared if the Court is at all  
11 mindful to enter any kind of a clawback order to hand up  
12 what we propose to the A.G.'s office, but I will say,  
13 your Honor, I believe it unnecessary in that the E.S.I.  
14 rule already contains a clawback and there is no  
15 prejudice whatsoever to my sister from proceeding with  
16 the provisions in the confidentiality order concerning  
17 inadvertent disclosure without a clawback order. We are  
18 bound by those provisions. We are not permitted to use  
19 those documents in this litigation.

20 So, your Honor, I guess at the end of the day we  
21 have spent 50 hours on this matter, \$20,000. The A.G.  
22 should pay us \$10,000 so we can put that back into the  
23 pension fund so people know that this has a sting. There  
24 is no excuse for a subpoena served on November 7th to  
25 have 20 or so legal interventions up to this point.

1           THE COURT: Thank you. Counsel, I started asking  
2 your partner before, but from your prospective, if the  
3 Court was to rejigger the priorities in terms of what is  
4 most important to you in terms of what documents to get  
5 first, and the Court is fully aware that at the last  
6 hearing or it might have been the one before that it was  
7 very clear that you wanted all of the documents and the  
8 Court allowed that. But let's talk about priority  
9 because there is so many hours in a day and you can help  
10 me in terms of what you want first.

11           MR. SHEEHAN: Well, your Honor, Mr. Wistow said and  
12 I agree wholeheartedly, we want the confidential  
13 documents. We also want anything that is not part of the  
14 formal hospital conversion file in the sense that it was  
15 either made publicly available or marked confidential.  
16 In other words, it was not part of the formal record but  
17 pertains to the pension. There were communications,  
18 e-mails, letters, phone discussions to which the A.G.'s  
19 office was involved involving the pension, and those  
20 communications are not going to be reflected in the world  
21 of the formal file of the Hospital Conversion Act.

22           Did anybody in the A.G.'s office say what does it  
23 mean to say this pension is 90 percent funded? Did the  
24 A.G.'s office realize that that only made sense if the  
25 entity that had responsibilities going forward with



1 respect to that pension was going to make contributions  
2 every year into the future at a time when it was known  
3 that was not going to happen, that this pension plan was  
4 being orphaned from the hospital, orphaned from an income  
5 stream? So this reference to 90 percent funded was  
6 illusory. Did the A.G.'s office realize it or were they  
7 duped perhaps into believing that that 90 percent figure  
8 had some meaning? That is the core issue here, your  
9 Honor, and all this dancing around clawbacks --

10 THE COURT: I'm trying to understand. I'm ruling  
11 on the motion but in terms of status, one of the things  
12 we talked about last night is a rolling production. I'm  
13 trying to understand that if you don't get another  
14 document for several days except for, it sounds like  
15 number one priority or, okay, you want all the documents  
16 that were deemed confidential and we want things not part  
17 of the file, which would be public applications, all  
18 confidential documents that discuss the pension plan,  
19 fully understanding that some of that there may be a  
20 privilege.

21 MR. SHEEHAN: I understand that, your Honor, and we  
22 are prepared to fight tooth and nail on that issue of  
23 privilege.

24 THE COURT: One step at a time.

25 MR. SHEEHAN: Your Honor, let me say one other

1 thing, yes, we spent undue time on this matter, but we  
2 have documents from St. Joseph's. We haven't had time to  
3 look at those documents. Not only are we spinning our  
4 wheels with the A.G.'s office, it's keeping us from doing  
5 our job with respect to the parties that have complied  
6 with the subpoena. We are going to be here in two  
7 minutes with respect to Prospect. We are going to be  
8 back, your Honor, with respect to other parties with the  
9 subpoena and there is going to be a tone.

10 THE COURT: Thank you very much.

11 MR. SHEEHAN: Thank you, your Honor.

12 MS. ENRIGHT: Your Honor, if I may respond briefly?  
13 Just in terms of the document production, I just want to  
14 emphasize that the documents that are all -- the War Room  
15 location is in Boston. They have all of our documents  
16 that we have identified in hard copy that would be  
17 responsive to the subpoena. Those documents are coming  
18 to us so far in sets of five. We have requested that  
19 they be expedited so we get them all back in a more  
20 expedited manner. To get those documents back from  
21 Boston and then to pull them, pull confidential documents  
22 at this point would be a different process than how we  
23 are proceeding right now.

24 THE COURT: Let me just understand. How many boxes  
25 as of today do you expect back, total? Is it seven or

1 ten?

2 MS. ENRIGHT: If there are a total of 30 boxes, we  
3 have ten back.

4 THE COURT: You expect some today?

5 MS. ENRIGHT: Yes, we're expecting five today, which  
6 will be 15.

7 THE COURT: With respect to those 15 boxes, you'll  
8 have them and that's not something that is in Boston if  
9 there is confidential documents in there that you can  
10 pull; correct?

11 MS. ENRIGHT: Yes, but I do -- yes, the confidential  
12 boxes can be pulled and the boxes that we are coming into  
13 now are not the boxes that are the application  
14 submissions that Mr. Sheehan is referring to that they  
15 have received. We were getting into our working files  
16 and that's, obviously, what he is referencing. So in our  
17 working files, we will be reviewing those boxes for  
18 privilege and for confidentiality. We happens in the  
19 course of a Hospital Conversion Act review is there is an  
20 initial application submitted at the outset.

21 We were asked last time to start at the beginning  
22 with 2014. That means that application is the first  
23 thing we get. That's why that's the first thing they  
24 saw. Then we get into a period of deeming the  
25 application complete. During that period there are

1 questions back and forth, and eventually the Attorney  
2 General will get to a point, along with the Department of  
3 Health, where we deem that application complete. There  
4 is then another application submission, and, again, we  
5 will see more publicly available documents, confidential  
6 documents, and then a mix of documents as we conduct our  
7 review that is conducted in that 120-day time period and  
8 then we reach decision.

9 So the way that this is going to flow is we have  
10 gotten through the initial application submission is that  
11 now we are in the period of document production where we  
12 are exchanging information with the parties to get to a  
13 complete application. This is why the documents that are  
14 coming today contain mostly confidential documents. I  
15 think getting more boxes from War Room and pulling out  
16 confidential documents and weeding through the boxes to  
17 find those will be more time consuming than just  
18 producing the box as it exists, the confidential I.D.  
19 that we are placing on it as we review it.

20 Your Honor, I'm only making this point because of  
21 the tight timeframe. We want to be able to get through  
22 this and the E.S.I. by the court-imposed deadline, and I  
23 am a little bit concerned about having to pull things out  
24 and go through boxes just to pull things out and then  
25 return to those boxes that would then be out of order.

1 THE COURT: The documents from War Room they are  
2 being scanned as well. Do you have an electronic record  
3 also?

4 MS. ENRIGHT: I do.

5 THE COURT: And those confidential documents are  
6 labeled when they came in as confidential?

7 MS. ENRIGHT: Sometimes.

8 THE COURT: Well, that's the problem. Okay.

9 MS. ENRIGHT: The application submission comes from  
10 the transacting party to our office bate stamped, but not  
11 every submission from the transacting party would have a  
12 bate stamp. So War Room is putting a bate stamp on them.

13 THE COURT: I guess my question is different. If  
14 the Attorney General makes a determination a document is  
15 deemed confidential, are you telling me not all of those  
16 documents that are deemed confidential are marked in some  
17 way?

18 MS. ENRIGHT: What I am telling you is that there  
19 will be a bate stamped document that is submitted to us  
20 with the request for a confidentiality determination. We  
21 would then, assuming we deem the document confidential,  
22 put it on a confidentiality chart and we would put the  
23 name, the description of the document, and then identify  
24 the bate stamp.

25 THE COURT: I'm talking about the time of the H.C.A.

1 process.

2 MS. ENRIGHT: The time of the H.C.A. process before  
3 that document is submitted to us with the bate stamp  
4 formal form with the formal request for confidentiality,  
5 we may have had discussions with the parties about the  
6 substance that end up in that final document. Those  
7 discussions, those e-mails, those letters, those are not  
8 bate stamped documents.

9 THE COURT: I'm talking about the document submitted  
10 as part of the application.

11 MS. ENRIGHT: Part of the application, your Honor,  
12 yes.

13 THE COURT: We have a listing or the Attorney  
14 General has a listing of all of the confidential  
15 documents.

16 MS. ENRIGHT: Yes, we have two different periods  
17 with the conversion act of 2014. I'm speaking of 2014  
18 now where we issued a confidentiality determination upon  
19 deeming the application complete and then again following  
20 the decision because material is submitted supplementally  
21 after we deem the application complete.

22 THE COURT: I'm trying to understand if you have  
23 electronic documents and you have a need for those  
24 documents, how difficult is it to search for the  
25 documents and pull those out?

1 MS. ENRIGHT: Because not all of the documents that  
2 are confidential are submitted in connection with the  
3 application. They certainly are but there are documents  
4 that are not submitted in connection with the application  
5 that would not have bate stamps that would be difficult  
6 to identify as confidential because they don't have a  
7 bate stamp until War Room puts them on it.

8 THE COURT: Maybe I'm misunderstanding. There are  
9 confidential documents that are deemed confidential by  
10 the Attorney General under the hospital conversion under  
11 the statute?

12 MS. ENRIGHT: Yes.

13 THE COURT: And those are the documents for the most  
14 part that are submitted in supplemental application and  
15 you have a list of those; correct?

16 MS. ENRIGHT: Yes.

17 THE COURT: What else are you talking about that is  
18 confidential?

19 MS. ENRIGHT: I'm talking about the communications  
20 between the parties that could have the context --

21 THE COURT: I'm not concerned with those. You go  
22 through and you do your review. Are they deliberative  
23 process or work product --

24 MS. ENRIGHT: But, your Honor, they can also be  
25 confidential because of the substance of what is in the

1 communication.

2 THE COURT: Right, but confidential under the  
3 Hospital Conversion Act under the statute?

4 MS. ENRIGHT: Yes.

5 THE COURT: Where did you find them deemed  
6 confidential?

7 MS. ENRIGHT: Once they are submitted to us in the  
8 formalized manner such as via the application submission.

9 THE COURT: Right, but the statute says you need to  
10 deem them confidential.

11 MS. ENRIGHT: Yes, but before they are deemed  
12 confidential and submitted to us with that request, they  
13 could possibly exist within, let's call it, our working  
14 file.

15 THE COURT: Once they become deemed confidential,  
16 they become part of that listing.

17 MS. ENRIGHT: The particular document that is  
18 transmitted.

19 THE COURT: That's what I'm talking about, the  
20 document.

21 MS. ENRIGHT: Yes.

22 THE COURT: So if I were to say the document is  
23 deemed confidential by the Attorney General, in terms of  
24 the application, not the back and forth, because we're  
25 going to be dealing with that separately. That's the



1 case I'm talking about, we have an application and they  
2 have the statute that's deemed confidential. So they can  
3 understand what is going to happen here, for 15 or so  
4 boxes there will also be an electronic set. I understand  
5 you're saying the other boxes are in Boston. I guess  
6 what the Court has to say is I understand the production  
7 may take an extra day or two on the back end. What I'm  
8 saying is that you have three reviewers and whatever  
9 else, somebody has to drive an hour and identify those,  
10 so you can run them through the machine. Am I missing  
11 something?

12 MS. ENRIGHT: I just want to be clear that aside  
13 from the documents that are bate stamped and designated  
14 as confidential, that there are other confidential  
15 documents that we would be labeling as confidential and  
16 would fall under the protection of the confidentiality  
17 order.

18 THE COURT: I understand that and the Court can  
19 decide that issue if it's brought up between the parties.  
20 On the back end, now we can deem something confidential.  
21 I don't know the answer to that. I just want to be  
22 clear, I'm talking about the things you already marked.

23 MS. ENRIGHT: Yes.

24 THE COURT: Okay. Anything further?

25 MS. ENRIGHT: No, your Honor. I just want to

1 reiterate that our request is pretty simple and Mr.  
2 Sheehan got into some areas that I just want to respond  
3 to quickly as far as the untimeliness. He referred to an  
4 elaborate dance at one point. The confidentiality order  
5 was an order that needed to be reviewed by other parties.  
6 Special Counsel's office and our office we promptly  
7 arrived at an agreement that needed to be also reviewed  
8 by the transacted parties to the 2014 conversion so they  
9 could express any concerns that they had with the  
10 confidentiality order. That had nothing to do with our  
11 office causing any delay.

12 THE COURT: I'm trying to understand that. I saw  
13 that in your papers. There was a subpoena sent to the  
14 Attorney General's Office. The Court heard the motion  
15 and said subject to a protective order should you  
16 disclose. Where do all the other parties that you chose  
17 to bring into the process --

18 MS. ENRIGHT: Well, it was our understanding that  
19 the direction was to develop the confidentiality order  
20 with Mr. Wistow's office, and then in connection with Mr.  
21 Wistow's office that the parties who had provided that  
22 confidential documentation would be reviewing this order.

23 THE COURT: I read the transcript. There are two  
24 ways you can do it. One is you obtain the parties'  
25 consent. If there is no issue that you have or anyone

1 else, the documents can be sent over. And at the time of  
2 the hearing St. Joseph's didn't have an issue with it,  
3 Attorney Cavanagh said I have reviewed them, I am allowed  
4 to reserve, and that's fine. When I was reading the  
5 papers I was just a little confused why, you know, at one  
6 point there was eight attorneys at the table from  
7 different places, why these other groups were involved.

8 MS. ENRIGHT: It was just Mr. Cavanagh and Mr. Land  
9 who looked at the documents as representatives of the old  
10 co., the old entities, and the new entity owned by  
11 Prospect. We didn't receive any resistance. It seems  
12 Special Counsel's office and my office were both under  
13 the understanding that was something that was to be  
14 reviewed by those parties.

15 THE COURT: That's fine. One of the issues came up  
16 on the clawback.

17 MS. ENRIGHT: So we have never envisioned that the  
18 confidentiality order or the E.S.I. plan would substitute  
19 for a clawback. We always wanted to see a procedure in  
20 place should there be an inadvertent disclosure of  
21 documents. To be clear, the confidentiality order and  
22 the E.S.I. plan both have a paragraph that discusses  
23 inadvertent disclosure, but it does not address a  
24 procedure for what happens after the inadvertent  
25 disclosure. Frankly, it was a little surprising when we

1 sent it and we received so much resistance to it from  
2 Special Counsel. We always thought that a clawback was  
3 going to follow as our production was produced. One  
4 minute, your Honor.

5 THE COURT: Sure.

6 MS. ENRIGHT: So as far as Special Counsel's  
7 priorities, the confidentiality chart that I referenced  
8 before, there are two of them. If Special Counsel would  
9 view those charts and identify documents that they wanted  
10 to have us produce immediately, we would --

11 THE COURT: Those few documents that he referenced?

12 MS. ENRIGHT: Yes. Understandably those are all in  
13 Boston right now. We would work as quickly as we could  
14 to get that. Our hard copies, that is. We can do this  
15 electronically faster.

16 MR. SHEEHAN: If I may very briefly?

17 THE COURT: Very briefly. You can do it right from  
18 there.

19 MR. SHEEHAN: Sure. These logs pertaining to  
20 specific exhibits to the Attorney General's office, they  
21 couldn't be more specific. Exhibit Three they identified  
22 the date and they say it's confidential. The fact they  
23 have any trouble pulling out the actual exhibit to the  
24 Attorney General's Office is mind boggling, your Honor.  
25 Thank you.

1           THE COURT: Before I move on to the motions, it's  
2 somewhat related. I did receive a motion late Friday  
3 from Prospect. You may be heard.

4           MR. CAVANAGH: Thank you, your Honor. Good morning.  
5 We filed that motion late in the day on Friday, your  
6 Honor, because --

7           THE COURT: At 11:27 at night.

8           MR. CAVANAGH: Right. Just before the bell, as they  
9 say. We knew this hearing was on for this morning and we  
10 knew that your Honor was to perhaps compel immediate  
11 disclosure of all confidential material by the A.G. to  
12 Special Counsel, so we wanted to step in. And consistent  
13 with our reservation of rights at your hearing held on  
14 November 29th on the same topic to make sure that we did  
15 bring to the Court's attention a very narrow subset of  
16 the documents that upon review of the information  
17 submitted to the A.G. during the 2014 only H.C.A. review  
18 process, we deemed to be particularly sensitive. In the  
19 first instance we would argue that they should be  
20 excluded all together, but we did reach out to Special  
21 Counsel and offered in lieu of motion practice, so as not  
22 to slow down the process any further, that we would  
23 submit those materials to you in camera for review. I  
24 was busy over the weekend. To make sure I arrived this  
25 morning with a package for your Honor with a flash drive

1 submitting under seal those 336 pages. And, believe me,  
2 when the A.G. conferred on this topic, I was sure to  
3 widdle down as much as possible that list knowing that  
4 we're potentially making this proposal to your Honor and  
5 to Special Counsel.

6 So that's what we're asking for this morning. The  
7 material, without saying too much in open court, your  
8 Honor, they deal with confidential patient information,  
9 they deal with pending litigation, to include commentary  
10 and analysis from internally at Prospect about that  
11 pending litigation. I don't believe the word pension  
12 appears in any of them, your Honor, those 336 pages. And  
13 we would submit they are wholly unrelated to Special  
14 Counsel's review of the transaction in connection with  
15 this matter.

16 THE COURT: Which application process were they  
17 filed under?

18 MR. CAVANAGH: 2014 only. They are limited to 2014.

19 THE COURT: Thank you, counsel. Does the special  
20 master wish to be heard?

21 MR. WISTOW: Let me say, your Honor, that I have the  
22 distinct impression that we are getting tag teamed by the  
23 Attorney General and by Prospect CharterCare. Just look  
24 at the timing of what is going on here. I am going to  
25 explain to you for how long we have been negotiating with

1 Prospect CharterCare to avoid this hearing. So late  
2 Friday we get an emergency motion. We don't have time to  
3 brief it, let alone send a brief to your Honor. We  
4 barely got the brief in from the Attorney General's  
5 office. We are ready to go forward and argue on the  
6 merits anyway. I don't want to delay this because we  
7 were under terrible time constraints.

8 Basically Mr. Cavanagh is asking the Court to vacate  
9 existing orders and to start all over again. Now, we  
10 have two reasons to object to that. One is procedural,  
11 which I'm going to get into, and the second one is this  
12 argument that how can any of this be relevant, and,  
13 therefore, it should be shown to your Honor in chambers  
14 in camera. I want to address both of those.

15 To understand the procedural problem we have, Mr.  
16 Cavanagh was in court on the 29th. That was three weeks  
17 ago. The transcript of the hearing makes very very clear  
18 your Honor was saying give Special Counsel all of the  
19 confidential material and heaven help him if he discloses  
20 the stuff inappropriately. If we're going to use it, we  
21 have to use it only after submitting to your Honor a  
22 motion under seal explaining why it's relevant.

23 As a result of the hearing, we prepared a proposed  
24 order, proposed orders, for the production and the  
25 confidentiality the very next day, November 30th, and

1 sent it to the Attorney General and all counsel of  
2 record, including Mr. Cavanagh. And I would like for the  
3 record to hand up the transmittal that we sent to  
4 everybody. I think it's very important to understand why  
5 I say we are getting tag teamed.

6 THE COURT: Madam Clerk, if you could just mark it  
7 Court One.

8 MR. WISTOW: So your Honor, the day after the  
9 hearing -- I'll take a moment.

10 THE COURT: Thank you.

11 THE CLERK: Your Honor, this is Court Exhibit One.

12 (Exhibit so marked.)

13 THE COURT: Go ahead, counsel.

14 MR. WISTOW: So even though I felt there was no  
15 obligation to get any input from Mr. Cavanagh or Mr.  
16 Land, as a courtesy to them, and, more importantly, to  
17 avoid any further delay I sent the proposed orders to  
18 everybody in the case, everyone, and I specifically asked  
19 the Attorney General's Office, "Please discuss any issues  
20 regarding the confidentiality order with Attorneys Land  
21 and Cavanagh and send a proposed revision that is  
22 satisfactory to both of them and to the Attorney  
23 General's Office." That was on November 30th.

24 On December 5th -- I'm going to hand up a series of  
25 e-mails to explain exactly how we got where we are today.



1 THE COURT: You may mark that as one package.

2 MR. WISTOW: So it may appear to the world that all  
3 we are doing here is coming to court and arguing. We  
4 spent countless hours in our office fighting and dealing  
5 with tedious issues regarding stuff that was absolutely  
6 already agreed upon by the Court. I want to direct your  
7 Honor to my e-mail on December 5th. It's on the third to  
8 the last page.

9 THE CLERK: Your Honor, that is Court Exhibit Two  
10 for the record.

11 (Exhibit so marked.)

12 THE COURT: Thank you. Go right ahead.

13 MR. WISTOW: And this is from me to Mr. Cavanagh,  
14 December 5th. This is roughly a week after the hearing  
15 and recalling that we sent him on November 30th the  
16 proposed order. I would like to read it into the record  
17 because I think there are people here who are interested  
18 in this. "Joe, we sent you and everyone else involved  
19 the proposed orders including the confidentiality order  
20 on Thursday. We heard nothing from you until the A.G.'s  
21 office informed us this afternoon that you had just  
22 called. The draft confidentiality order circulated  
23 yesterday by the A.G.'s office reflects the form agreed  
24 to by Special Counsel and the A.G.'s office attached  
25 again herewith. We intend to file it with the Court

1 tomorrow by close of business. We cannot delay this.  
2 The A.G.'s office has also indicated the other draft  
3 order circulated yesterday with redline, also attached  
4 herewith in final, is acceptable to them. We intend to  
5 file that order too. You may tweak the confidentiality  
6 order (restricting our disclosure of the material) but  
7 not seek to limit our getting all the confidential  
8 material." And we underline "all" in the e-mail.

9 On December 6th, the next day, at the end of the  
10 day, we are still trying to work this out. This is on  
11 the fifth page of the document I handed up. "Joe, we  
12 e-mailed an order to everybody including you last  
13 Thursday. We asked that you and the A.G.'s office work  
14 out any issues you might have before the A.G.'s office  
15 got back to us with a revision. You did not do so.  
16 Indeed, you waited until yesterday afternoon, after we  
17 already agreed to the form of the order with the A.G., to  
18 raise even a single issue. That is precisely the type of  
19 delay we were hoping to avoid. This motion has been  
20 pending since November 17, 2017, and you are stonewalling  
21 the A.G.'s production of documents that the Court has  
22 already ruled must be turned over to us. We don't agree  
23 that you properly reserved anything on the record at  
24 last's week hearing, but we are not looking to drag this  
25 out and delay matters further, especially since the

1 A.G.'s office and we previously agreed to the form of  
2 this confidentiality order."

3 Then I go on and try to say, okay, I've listened to  
4 some of your comments. I will adopt some of them. And I  
5 say, "We assume the attached revisions are acceptable to  
6 the A.G.'s office." I am adopting things he wants. "If  
7 they are not acceptable to the A.G.'s office, we will  
8 adhere to the previously agreed-upon revision." And then  
9 I go on to say if it's not acceptable -- let me read it.

10 "We need to know definitively by 6:00 p.m. today  
11 whether the attached revisions are acceptable. We don't  
12 have time to negotiate this. If this revised version is  
13 not acceptable to you, then we will file yesterday's  
14 version previously agreed by us in the A.G.'s office with  
15 the Court, and you can seek whatever relief you demand  
16 from Judge Stern, at a hearing in open court. We are not  
17 willing to have a conference on this matter." That's on  
18 the 6th. We adopt his revisions and we file the order  
19 with the Court.

20 Under Rule 77(f) of the Superior Court Rules of  
21 Procedure, whether my proposed order made him happy,  
22 whether it didn't make him happy, he had four days under  
23 the rule to object to the order or put in a counter. He  
24 did not. And he has waived, if he had any rights, which  
25 I suspect he has not, he completely waived them by

1 sitting around and conversing back and forth with the  
2 Attorney General delaying. We've got nothing.

3 Now, under the substantive issue of why we should  
4 get this. At first blush it certainly looks like some of  
5 these things, well, what do they have to do with the  
6 pension and the answer is, your Honor, first of all, this  
7 is not a lawsuit. I have not sued anybody. I am acting  
8 in effect as an officer of the Court trying to do an  
9 investigation of whether or not there is a basis for  
10 bringing suit against anybody in order to put money into  
11 this fatally flawed plan. So the inquiry here really  
12 should be broader than what is allowable under the civil  
13 rules of discovery where there is a complaint setting  
14 forth specific allegations and the Court can look at a  
15 particular type of discovery and say, well, yeah, this  
16 may be related to the particular claims or your Honor  
17 might say it's not, but we don't have particular claims  
18 yet. We are doing an investigation under the equitable  
19 powers of this Court sitting in a receivership.

20 Now, if your Honor reviews the matter in chambers,  
21 these particular documents in chambers, and I say this  
22 with some trepidation, I hope at this point that I have  
23 a better understanding of where we are in this case about  
24 whether or not there is claims than does the Court  
25 because the Court hasn't had available to it the means of

1 investigating that we have so far.

2 Now one of the things that I expressly said in open  
3 court, it's in the transcript on page 15 through 17 of  
4 the transcript, was that we already found  
5 misrepresentations by Prospect CharterCare, specifically  
6 to the Attorney General and specifically in a letter  
7 written in our pen, I think it was, but it was handed up  
8 in evidence to the Providence Journal where the president  
9 of the old hospital and the president of Prospect  
10 CharterCare actively misrepresented, and I quoted  
11 verbatim, actively misrepresented what was going to be  
12 the participation of the old people, the local people,  
13 and they said it was going to be fifty-fifty and the  
14 chairman of the board of the new hospital would have a  
15 veto, and I submitted to your Honor the actually  
16 documents for the acquisition, which showed that it was  
17 utterly false. If there was any kind of deadlock, four  
18 for the local, four for profit, the for profit got its  
19 way on every significant point.

20 Now, where does that all take us? I'm sitting and  
21 one of the things that we're looking at is whether or not  
22 Prospect CharterCare, the for profit took this over, has  
23 potential successor liability. Now, that's at this point  
24 something we need to look into because Prospect is a very  
25 large company with very deep pockets and I need to see

1 did they participate in some wrongdoing in getting  
2 approval of this transaction. I think they did to a  
3 certain extent. They certainly misled, I hope he was  
4 misled, the Attorney General in approving this quoted  
5 favorably about the local control. So what else did they  
6 misrepresent to the Attorney General? I don't know. I  
7 haven't seen the documents I would like to find out and  
8 say there are other misrepresentations. Now, Prospect  
9 CharterCare was not the only suitor for this bride.  
10 There were other hospitals interested in it who maybe got  
11 pushed aside because of possibly these  
12 misrepresentations.

13 So what I'm saying is this, your Honor, we spent an  
14 enormous amount of time trying to develop theories about  
15 bringing money into this thing and we have a good deal of  
16 knowledge, not near enough that we need, and I  
17 respectfully say it would not be good if your Honor goes  
18 through these documents in chambers without the necessary  
19 background that says, well, I don't see how this possibly  
20 can help.

21 So what I ask your Honor to do, in view of the  
22 belated nature of this, the fact Mr. Cavanagh is asking  
23 to vacate the prior order and because of the importance  
24 of it all, I am asking your Honor to give us these  
25 documents under the protective order, that if we disclose

1 this, we are in contempt of court which I am not looking  
2 forward to be, your Honor. Thank you.

3 THE COURT: Thank you. Attorney Cavanagh.

4 MR. CAVANAGH: Thank you, your Honor. To respond  
5 first to Mr. Wistow's comments about the process involved  
6 here, I had stated this on November 29th at the hearing,  
7 that is I received notice of that hearing through an  
8 informal channel. I received belated notice of the  
9 briefings.

10 THE COURT: The Court absolutely allows you to  
11 reserve. This set of documents, is the issue that  
12 they're proprietary and confidential?

13 MR. CAVANAGH: They involve, your Honor, aspects of  
14 Prospect's operation beyond Rhode Island, unrelated to  
15 Rhode Island. I mentioned earlier they are unrelated  
16 entirely to the pension plan. They unrelated to the  
17 State of Rhode Island.

18 THE COURT: I guess my question isn't relevancy.  
19 The document itself, it has proprietary confidential  
20 information. Is that the issue here that you say is  
21 irrelevant to the proceeding? I'm just trying to  
22 understand.

23 MR. CAVANAGH: Well, the index, your Honor, is  
24 listed in the motion papers. You were looking at a list  
25 of current malpractice claims pending against Prospect,

1 quality data committee reports for the years 2011 through  
2 2013, another list of pending litigation in the  
3 commentary thereon. These are not documents that we can  
4 assert attorney/client privilege on, your Honor. They're  
5 coming through this channel to Special Counsel. This is  
6 our only opportunity to step in and do something about  
7 the fact this stands to be turned over to Special  
8 Counsel, these claims about malpractice history. And,  
9 again, I took great efforts with my client to widdle this  
10 down as much as possible.

11 But I do want to respond to his comments about the  
12 dilatory nature of our back and forth over the  
13 confidentiality agreement. There are really two separate  
14 issues. Throughout we made clear that our position is  
15 as negotiated and revised the terms of that order that we  
16 were not consenting in any way to a wholesale production  
17 once it was complete. That is in the e-mail stream. I  
18 don't have to walk through that right now.

19 THE COURT: You have completed that review?

20 MR. CAVANAGH: We have and Special Counsel has been  
21 living and breathing this matter since August, your  
22 Honor. We received late notice of that hearing. Since  
23 we received it, I was in the process of the documents had  
24 to be further located. Second, reduced to a form they  
25 could be sent out to California for final review, and we



1 had to do internal review in our office as outside  
2 counsel, and, again these are matters that were just  
3 coming to our attention and Special Counsel has been  
4 thinking about and strategizing about for months. We are  
5 not going to litigate the case in the dark, your Honor,  
6 and we had moved expeditiously under the circumstances as  
7 diligently as we could. I did along the way make what I  
8 believed to be reasonable proposals to avoid spending  
9 special attention on these matters while we're in the  
10 process now of responding to subpoenas directed to us and  
11 my arrival this morning with flash drives that your Honor  
12 could review as opposed to us making a unilateral  
13 determination and couldn't be exchanged is the fruit of  
14 that effort.

15 So I would invite your Honor to read the full e-mail  
16 presented by counsel, including my comments to him on  
17 December 6th where I pointed out that -- my comments  
18 followed promptly thereafter. Again, we haven't delayed  
19 production of the progress of this case one minute. One  
20 of the benefits of your Honor's order on 11/29 is that  
21 the A.G. is submitting regular, and has done twice now,  
22 submitted status reports. We were seeing in real time  
23 the progress of the production, and as we were on the  
24 other side trying to review material and come to a  
25 substantive determination about whether we needed to move

1 or not, and under the circumstances, I believe Friday was  
2 the juncture to do that and not before requesting by  
3 e-mail a meet and confer that this be done as motion  
4 practice, your Honor.

5 THE COURT: Counsel, just one issue that your  
6 brother counsel brought up, which is certainly there is a  
7 protective order in place in terms of relevancy or can  
8 lead to relevant information. The Court in an in-camera  
9 review probably is not in the best position to make that  
10 determination, which is why I ask that we talk about the  
11 proprietary and confidential information because a  
12 protective order, as this Court has done in other cases,  
13 isn't it best for you sit down with Special Counsel and  
14 they may be able to say, no, we don't need these  
15 documents.

16 MR. CAVANAGH: Well, the protective order was a  
17 product of discussion. It doesn't limit disclosure just  
18 to Special Counsel. It permits disclosure to outside  
19 vendors. We had discussion on this point. It actually  
20 doesn't include a term that calls for destruction of the  
21 information at the conclusion of this matter, which I can  
22 explain is very typical.

23 THE COURT: I am trying to work this through. If I  
24 was to say that, look, Attorney Wistow and the other two  
25 counsel that are entered into this case, the first step

1 is to have you review the documents and then make a  
2 determination that they're not even needed at all and  
3 it's done, or that they are and they're still under the  
4 protective order. My concern from a practical point of  
5 view, I'm going to look at certain financials and other  
6 things and I don't necessarily have enough information to  
7 know whether it's relevant or can lead to. And quite  
8 frankly, the Court is going to err on the side of  
9 caution. I have an order in place. I am talking about  
10 the process here.

11 MR. CAVANAGH: There are no financial records in  
12 this set. I couldn't, your Honor, agree to that  
13 proposal.

14 THE COURT: I understand that.

15 MR. CAVANAGH: However, if your Honor took that  
16 review, I mean, one potential ground is that your Honor  
17 grant this motion or exclude the document from production  
18 without prejudice to Special Counsel as the investigation  
19 proceeds. But, again, your Honor, our position is that  
20 in the first instance they ought to pass for your review.

21 THE COURT: Thank you. Very briefly.

22 MR. WISTOW: Your Honor, please. My brother is  
23 quite right when he says that he wants to put in a  
24 provision where we have to destroy the documents at the  
25 end of the case. The question came up what is the end of

1 the case. Does it include cases we bring? I didn't have  
2 time. The bottom line is I said to him enough is enough.  
3 I have adopted what I can. I filed it with the clerk.  
4 He had four days under the rules. That's the end of it.  
5 The other point I want to make, I want to emphasize this,  
6 he's saying, for example, how is it possibly relevant to  
7 give me a list of malpractice cases in other  
8 jurisdictions. What if I can show, and I have no reason  
9 to say that I'm going to, that I can show that they  
10 understated the number of times they have been sued in  
11 various other states by a factor of 90 percent. I need  
12 to investigate.

13 THE COURT: Thank you.

14 MR. CAVANAGH: That's precisely the type of  
15 information that might without prejudice be appropriate  
16 perhaps at a later juncture with the petition from  
17 Special Counsel.

18 MR. WISTOW: Later, later, later. We need to get  
19 this thing going.

20 THE COURT: I heard enough. Thank you very much.  
21 The Court will first address the Attorney General's  
22 motion. As I mentioned at the last hearing, the Supreme  
23 Court adopted in November of this year certain disclosure  
24 rules or certain rules dealing with electronically stored  
25 information and certain other documents that the Supreme

1 Court adopted. What I will say about it, because I'm  
2 very familiar because I chaired the Superior Court  
3 committee where the Superior Court signed off on those  
4 rules, they originally came from the Rhode Island Bar  
5 Association and then was approved by the Board of  
6 Governors to the bar association and House of Delegates  
7 and then came up here as well. Rhode Island I am happy  
8 to say finally adopted these rules and were asking the 46  
9 states to do so. South Dakota, Mississippi and a couple  
10 of other don't have the rule but we do. That was a large  
11 amount not only taking some of the rules from most of  
12 these other states, including the other jurisdictions in  
13 New England, but also a large amount of discussion and  
14 consensus to arrive at the rules itself.

15 The Court finds that the motion by the Attorney  
16 General's Office to put a specific timeline and duty on  
17 the Special Counsel is inappropriate in this case  
18 especially in line of the rules of civil procedure which  
19 are delineated in the order that the Court has already  
20 signed. The broad view of the Superior Court rules  
21 references these new rules in terms of others. That  
22 being said, the Court recognizes that there is a number  
23 of documents or many documents that are being produced in  
24 addition to electronically stored information, and the  
25 Court does note in the order that the inadvertent

1 disclosure applies not only to electronically stored  
2 information but also documents itself which actually goes  
3 beyond the rule. But the Court finds it appropriate to  
4 deny the motion, however, to find that through the same  
5 process established in our Superior Court rules for  
6 electronic information that will apply to documents but  
7 only until January 30th of 2018. I understand the  
8 Attorney General has provided a large amount of documents  
9 at this time and I want to make sure they have the  
10 ability to make a determination if anything was  
11 inadvertently disclosed. This is especially true of the  
12 fact although it's pending before our Supreme Court to  
13 amend the rules of evidence dealing with inadvertent  
14 disclosure, that is still not passed by the Supreme  
15 Court, and there is a variety of cases that deal with it.  
16 So I want to make this very clear for this proceeding.  
17 That certainly can be reviewed at that point, but the  
18 motion itself is denied with that caveat.

19 The second motion is the motion of Prospect.  
20 Prospect's motion is a small group of the 17,000 plus  
21 pages of documents that were deemed confidential by the  
22 Attorney General's Office should not be disclosed to the  
23 Special Master and the investigator due to the fact that  
24 they are not relevant and also they're proprietary,  
25 including malpractice, including other things.

1           As the Court stated from the beginning, Prospect is  
2 asking this Court to review 300 some odd pages of  
3 documents to determine whether it's relevant or can lead  
4 to relevant information in this proceeding. The Court  
5 first finds that it is true that the Court waited well  
6 over five days to sign the order and no objection was  
7 made. While Prospect was not a party to the order, it is  
8 clear that the Court at this point, based on the  
9 representations made on the record, they were part of the  
10 process as far as generating the order and the Court is  
11 going to deny it based on that.

12           However, this Court will do what has been done in  
13 many other complex cases. The Court will allow these  
14 documents to be disclosed to the Special Master and  
15 counsel in the special investigator's office for review.  
16 They will be subject to the protective order. This way  
17 counsel for Prospect and the special investigator sitting  
18 down together at some point and going through these  
19 documents, they may very well be a determination that  
20 they are not needed for this proceeding and can be sealed  
21 in some way. The Court finds it's very important,  
22 especially in the context of the special investigator  
23 being a direct fiduciary or indirect fiduciary to the  
24 Court through the Special Master/Receiver to allow them  
25 to investigate the claim.

1           As I said, as the Court has done in other cases, the  
2 best way to make that determination is under a protective  
3 order and now specifically tailored to just the special  
4 investigator and the attorneys in his office to meet and  
5 determine whether it can lead to relevant information in  
6 this case.

7           Therefore, the motion is denied in part and granted  
8 in part. It's granted only to the extent that the  
9 protective order that is currently in place with respect  
10 to these documents will temporarily be submitted to the  
11 special investigator, the attorneys in his office, and  
12 counsel for Prospect for review. The Court will be  
13 scheduling some other dates in this case that are far  
14 more aggressive than we've had before and we can address  
15 that issue after counsel has the opportunity to review  
16 it.

17           MR. WISTOW: With respect to the order for Mr.  
18 Cavanagh to display the documents, may we make copies of  
19 the documents provided we don't give them to experts or  
20 anybody else? It will be limited to our office. I don't  
21 want to be going through 300 odd pages.

22           THE COURT: I'm not limiting copies at all. I'm  
23 also not telling the Attorney General that I don't want  
24 them to go through their documents and pull them out.  
25 They are free to take the confidential documents and



1 remove them and separate the documents.

2 MR. WISTOW: Right, but what I'm say is we will be  
3 getting Mr. Cavanagh's documents?

4 THE COURT: Correct.

5 MR. WISTOW: Thank you.

6 THE COURT: I would like to in terms of the status  
7 report also address the terms of the confidential  
8 documents that the Court has now ruled there are a number  
9 of exhibits that were deemed confidential and others that  
10 as part of the application and supplemental applications.  
11 I think it's apparent to everyone during this proceeding  
12 these are very much a priority to the special  
13 investigator. I also understand that some of the  
14 documents there were provided as early as today will  
15 contain some of those confidential documents. I am going  
16 to order the Attorney General's Office to expedite the  
17 transmission of any and all confidential documents on a  
18 log that they have to the Special Master. I understand  
19 that this may include a short delay in terms of the  
20 rolling production as it may be necessary to conduct a  
21 search of the electronic documents they already have and  
22 to see what it would take to pull those exhibits from War  
23 Room to have them copied.

24 The Court also understands based on the status  
25 report that there is already a privilege log and with the

1 additional things on the privilege log based on the  
2 documents that have been submitted, it's this Court  
3 experience that when it comes to especially deliberative  
4 process, and work product privilege, there may very well  
5 be, as Attorney Sheehan mentioned, a dispute regarding  
6 privilege. The Court wants to deal with that issue on an  
7 expedited basis. And while I understand that the  
8 Attorney General's Office is still documenting the  
9 privilege, the Court is going to require by the end of  
10 the first week in January that both parties submit to  
11 this Court the legal standard and brief the issue of both  
12 the Court's authority to review and make a determination  
13 on both the deliberative process and work product  
14 privilege so the Court then can receive such documents  
15 that are appropriate in camera and I can hold a hearing  
16 and make a determination on the documents. I don't want  
17 to wait until the 15th when the document production is  
18 complete to have to start ordering briefing at that  
19 point.

20 Finally, the Court, while I understand we have a  
21 status report, we have certainly covered a lot of ground  
22 at this hearing and I want to see what is coming over,  
23 where we are with confidential documents, and make a  
24 status report. The Court is going to schedule a status  
25 report, which I assume will be relatively brief on

1 December 21th at 9:30 a.m. and a further status report on  
2 December 26th at 2:00 p.m.. I want to move this  
3 production forward as quickly as possible. I am fully  
4 aware, as I said in the past, that I have charged the  
5 investigator with gathering information and we need to  
6 gather that information. On the other hand, as I said,  
7 at the prior hearing, I completely understand that there  
8 may be documents that the Attorney General determines  
9 are privileged under the work product and  
10 attorney/client. I respect that and we will be receiving  
11 a privilege log, but, ultimately, the Court may be asked  
12 to make a determination whether those documents are, in  
13 fact, privileged.

14 The other thing I would like to discuss is there is  
15 a request from counsel for the special investigator in  
16 terms for fees and costs based on what they determined to  
17 be dilatory practices. The Court is not going to get  
18 into an exercise week by week until January 15th in terms  
19 of whether there should be any fee shifting or costs in  
20 this case. All the Court will say at this point is it  
21 must be document production is complete by the 15th.  
22 Counsel for the special investigator is free to file  
23 whatever motion that he wants and incorporate anything.  
24 I'm not taking a position one way or another, but the  
25 proper way to deal with that is a hearing before the

1 Court and eventually an evidentiary hearing if the Court  
2 feels that step is appropriate. While that was listed on  
3 the status report, the Court is taking no action on that  
4 and wants to reiterate any motion that is brought the  
5 proper time to bring that is the close of the return  
6 date, the return date noted by the Court on the subpoena.

7 We talked last time about meet and confer. I  
8 understand there is some disagreement among the parties,  
9 but what I heard in court was an agreement in terms of if  
10 there were certain documents that are priority to the  
11 special investigator, the confidential documents and some  
12 other documents which may or may not be protected, you're  
13 subpoena counsel. So there is a way we do that, just  
14 like we talked about last time as far as rejiggering  
15 which application goes first. Go ahead and do that. I  
16 am going to expect the parties to discuss that, and if it  
17 requires a couple of more days as far as response on the  
18 public documents at the end of the day, please try and  
19 work through it among yourselves. These are not issues  
20 that the Court necessarily needs to deal with. Although,  
21 I set down the 21st and 26th to deal with any problem. I  
22 would ask counsel for the special investigator to prepare  
23 orders on the two motions and submit that to the Court.  
24 Thank you very much. The Court is in recess.

25 (R E C E S S.)