

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

ST. JOSEPH'S HEALTH SERVICES )  
OF RHODE ISLAND )

VS. )

C.A. PC-2017-3856 )

ST. JOSEPH'S HEALTH SERVICES )  
OF RHODE ISLAND RETIREMENT PLAN )

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON JANUARY 5, 2018

APPEARANCES:

STEPHEN Delsesto, ESQUIRE.....RECEIVER  
GEORGE LIEBERMAN, ESQUIRE.....FOR ST. JOSEPH'S  
ROBERT D. FINE, ESQUIRE.....FOR ST. JOSEPH'S  
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL  
BENJAMIN LEDSHAM.....SPECIAL COUNSEL

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 70, inclusive, are a true and accurate transcript of my stenographic notes.

  
GINA GIANFRANCESCO GOMES  
COURT REPORTER

1 FRIDAY, JANUARY 5, 2018

2 MORNING SESSION

3 THE CLERK: PC-2017-3856, St. Joseph's Health  
4 Services of Rhode Island vs. St. Joseph's Health Services  
5 of Rhode Island Retirement Plan. Would counsel please  
6 identify themselves for the record and the parties they  
7 represent.

8 MR. LIEBERMAN: Good morning. George Lieberman for  
9 St. Joseph's.

10 MR. FINE: Robert D. Fine of Chace, Ruttenberg, &  
11 Freedman also for St. Joseph's.

12 MR. DEL SESTO: Stephen Del Sesto, court appointed  
13 Receiver, your Honor.

14 MR. WISTOW: Max Wistow, special counsel to the  
15 receivership estate.

16 MR. LEDSHAM: Benjamin Ledsham also special  
17 counsel.

18 THE COURT: I just need to clarify one thing.  
19 Attorney Fine, is Chace Ruttenberg still counsel because  
20 I received an entry of appearance from Attorney  
21 Lieberman?

22 MR. FINE: Yes, your Honor. He will be arguing. I  
23 hope to be more of a spectator here. I believe we are  
24 still counsel.

25 THE COURT: I just wanted to make sure. You're both

1 co-counsel?

2 MR. FINE: We are both co-counsel and Mr. Lieberman  
3 is lead counsel.

4 THE COURT: Okay. There is a motion to compel  
5 before the Court on both the first and the second  
6 subpoena. The Court after reviewing the objection by St.  
7 Joseph's sent a request to St. Joseph's and Attorney  
8 Lieberman to help the Court understand what documents  
9 have been identified, gathered, reviewed, or withheld  
10 under a claim of privilege during the past now 78 days  
11 since the service of the subpoena. The Court did impose  
12 a very aggressive deadline. The Court did receive last  
13 evening, and late last evening had the opportunity to  
14 review the 126-page supplemental report by St. Joseph's.  
15 This hopefully will enable the Court to conduct a more  
16 efficient hearing this morning.

17 But before we get to the motion itself, I still have  
18 some questions about the objection and the supplement in  
19 terms of status. Attorney Lieberman, first is it correct  
20 that there has been approximately 37,000 paper pages of  
21 corporate records that have been identified?

22 MR. LIEBERMAN: Yes, and they have been scanned,  
23 your Honor.

24 THE COURT: I will get to that next. And there is  
25 approximately 7,000 of corporate records, electronic

1 corporate records, that have been identified?

2 MR. LIEBERMAN: Yes.

3 THE COURT: Okay. And that there are 34 boxes of  
4 documents, according to your papers, in the possession of  
5 Prospect and they were turned over at one point to  
6 Prospect and they were subsequently taken back after the  
7 subpoena was issued.

8 MR. LIEBERMAN: Yes, your Honor. That was December  
9 4th when special counsel served Prospect with a subpoena.

10 THE COURT: In terms of what has been reviewed for  
11 privilege, would I be correct that all documents have  
12 already been produced and the first, second, and third  
13 response to the subpoena have been reviewed?

14 MR. LIEBERMAN: Yes, your Honor.

15 THE COURT: And it also appears that 5,575 out of  
16 the 7,000 electronic records have been reviewed?

17 MR. LIEBERMAN: I believe that is correct.

18 THE COURT: And then I want to talk about what has  
19 not been reviewed for privilege. So the 37,000 pages of  
20 paper corporate records have not been reviewed for  
21 privilege?

22 MR. LIEBERMAN: They have not been reviewed, your  
23 Honor.

24 THE COURT: Okay. And the 1,425 pages of electronic  
25 records, I understand when you filed, it was in the

1 process, but they have not been reviewed and the review  
2 has not been completed?

3 MR. LIEBERMAN: The review has not been completed.

4 THE COURT: And there has been no review while you  
5 have the 34 boxes in your possession of the Prospect  
6 records?

7 MR. LIEBERMAN: That's correct.

8 THE COURT: So next when I read through the response  
9 on November 8th and when I read through your papers, I  
10 just want to clarify what has been produced. In your  
11 response to the Court's request you talk about a range of  
12 bate-stamped pages that have already been produced which  
13 is about 14,605 pages. When I go through your response  
14 by the bate stamp numbers, it appears there is about  
15 7,000 pages. Do you know how many pages have been  
16 produced? Attorney Digou, if you can answer that  
17 question. You seem to be counsel for e-mail services.

18 MR. DIGOU: Good morning, your Honor. Could you ask  
19 that question again?

20 THE COURT: Sure. How many documents have been  
21 produced or how many pages have been produced? When I  
22 read though the 126-page response, there is a range of  
23 bate numbers that is a little over 14,000 pages. When I  
24 looked at the actual response, it appears to be about  
25 7,000 pages.

1 MR. DIGOU: In response we produced, your Honor, I  
2 think that because of the bate numbers and referring to  
3 the documents that have been bate stamped but not yet  
4 produced may have been a bit confusing. In response to  
5 the November 8th subpoena we produced, I believe, it was  
6 approximately 4,700 pages and that was reviewed, stamped,  
7 and produced both in the initial response on November  
8 8th, the first supplemental response on November 9th, and  
9 then a subsequent or second supplemental response at some  
10 point in December.

11 THE COURT: December 12th?

12 MR. DIGOU: Right.

13 THE COURT: So that helps. So we're talking about  
14 4,700 or so pages that were produced on November 8th?

15 MR. DIGOU: In all of the supplemental responses, so  
16 between November 8th, November 9th, and December 12th.

17 THE COURT: It looks like there were 19 pages on  
18 November 9th and 19 pages on December 12th. So what the  
19 Receiver and the Special Investigator have at this point  
20 is approximately 4,700 pages that have been reviewed for  
21 privilege and confidentiality and have been sent out.  
22 And I see there was a reference to a privilege log.

23 MR. DIGOU: That's correct, your Honor.

24 THE COURT: So the next question is after November  
25 8th, which seems to be the last production with 19 pages

1 on the other two dates, what has occurred over those 58  
2 days?

3 MR. DIGOU: Your Honor, we have been reviewing the  
4 electronic documents, which in our response we identify  
5 them, which is I believe the 7,000 that you're referring  
6 to. So that is a partial review of the electronic  
7 documents that we have in our possession. When I say  
8 partial, there is about 1,425 documents remaining to be  
9 reviewed, so in total it's about 8,500 documents. So we  
10 are more than a majority of the way through the  
11 electronic documents and those have been reviewed and  
12 bated stamped and prepared for production, and, you know,  
13 that is the subject of the merits of the motion.

14 THE COURT: I'm just trying to understand. So, you  
15 know, the 58 days have gone by. What you're saying is  
16 that you have reviewed several thousand or a little more  
17 than that documents for privilege and confidentiality?

18 MR. DIGOU: We've also collected and prepared for  
19 production the over 37,000 pages of paper documents. So  
20 that's approximately 45 boxes and there are ten  
21 additional boxes of corporate records that have not yet  
22 been scanned, reviewed, or scanned for production. So a  
23 total, your Honor, 55 boxes have been collected.

24 THE COURT: I understand collected, but in terms of  
25 review, the only review that has been done is the 45 or



1 4,700 that have been produced and the electronic records  
2 that you have gotten through at this point?

3 MR. DIGOU: That's just with respect to the first  
4 subpoena. In that time period that you're referring to,  
5 your Honor, we were served with a second subpoena and  
6 we've begun collecting documents and reviewing documents  
7 in response to the second subpoena. So it was a  
8 multifaceted approach.

9 THE COURT: So what has been scanned at this point?

10 MR. DIGOU: 45 boxes of the corporate records have  
11 been scanned, which is the reference to the 37,000 pages.

12 THE COURT: And so those have been scanned and bate  
13 stamped?

14 MR. DIGOU: They have been scanned and bate stamped.  
15 That's correct.

16 THE COURT: What remains to be scanned and bate  
17 stamped?

18 MR. DIGOU: There are ten boxes retrieved by St.  
19 Joseph's that are corporate records that have not been  
20 scanned, reviewed, or stamped. They are in queue with  
21 the vendor to be scanned.

22 THE COURT: And it looks like from a letter from  
23 Attorney Land it was sometime in November that those were  
24 sent to the vendor. In his letter it said within a  
25 couple of weeks it will be scanned. All boxes are not

1 completed at this point?

2 MR. DIGOU: That's correct.

3 THE COURT: And there has been no review of those  
4 boxes. I understand we're getting to that in terms of  
5 the subpoena.

6 MR. DIGOU: That's correct.

7 THE COURT: Okay. Thank you very much, counsel.  
8 That helps. Why don't you proceed, counsel, with your  
9 motion.

10 MR. WISTOW: Before we begin, your Honor, I don't  
11 think I ever been so confused and frustrated as I have in  
12 this case and especially this morning. I just heard  
13 counsel say that because of the second subpoena they were  
14 diverted to go through the records regarding that second  
15 subpoena. They responded in the 126 pages by saying  
16 there are no such items, which I find very incredible and  
17 I'm going to address as we go on.

18 Your Honor, in the correspondence which has been  
19 submitted to your Honor, and I sympathize with your  
20 having to read all of this stuff. Mr. Land represented  
21 there were 79 boxes of materials between corporate  
22 records and Prospect's records. Nobody has ever defined  
23 what we're talking about. I believe, and maybe we can  
24 get this clarified today once and for all, I believe that  
25 what happened here was in the acquisition in 2014,

1 Prospect, and I'm talking about the for-profit new  
2 hospital, acquired many records, the title to many  
3 records, and physically has those. I also believe that  
4 because St. Joseph's as a corporation, it was a wind  
5 down, that the records that St. Joseph's had but continue  
6 to maintain title on was not all of the records  
7 transferred. They're still physically at Prospect. I  
8 believe that's the case. And it would be very helpful if  
9 that point could be clarified once and for all. I am  
10 going to inquire of the Court if we could substantiate  
11 that through counsel because it's very relevant this  
12 issue about Prospect's obligation.

13 I furnished the Court and I furnished counsel months  
14 ago with the contract that gives them access to all of  
15 the records, even the ones that have title in Prospect  
16 for the purposes of investigations and audits expressly.  
17 So I am going to implore the Court if we could just find  
18 out am I correct that what we're talking about with  
19 corporate records means the records that St. Joseph's  
20 still owns but are physically at the hospital, and the  
21 other records are those that were sold to Prospect as  
22 part of the acquisition, but which under the contract St.  
23 Joseph's still has access to.

24 THE COURT: If counsel can answer, just this bundle  
25 of records, I understand some you had, some were taken

1 back, why don't you clarify that.

2 MR. LIEBERMAN: Subject to Mr. Digou's  
3 clarification, I will say the corporate records are not  
4 -- St. Joseph's own corporate records are not with  
5 Prospect. They are with the vendor.

6 THE COURT: They are with what?

7 MR. LIEBERMAN: The vendor.

8 MR. WISTOW: Where were they before they went to  
9 the vendor?

10 THE COURT: Before you sent them to the vendor, did  
11 St. Joseph's have possession of those records?

12 MR. LIEBERMAN: I think they may have been in the  
13 hands of Prospect. We got them back from Prospect and  
14 gave them to the vendor to scan.

15 THE COURT: Maybe Attorney Digou can answer better.  
16 I want to know what you have. It looks like from  
17 Attorney Land's correspondence there was meetings and  
18 discussions with Prospect.

19 MR. DIGOU: Your Honor, you'll have to excuse me. I  
20 wasn't prepared to answer a question that was posed in  
21 open court.

22 THE COURT: I will tell you counsel that the  
23 questions that I ask, it's clear that the Court is  
24 wrestling with what is going on.

25 MR. DIGOU: Understood, your Honor. I'll try my

1 best from my recollection without being able to have a  
2 precise document or refer to the contract.

3 THE COURT: I'm not talking about the contract. I  
4 just want to know the boxes of documents, did you have  
5 them all along or were some of them retrieved from  
6 Prospect?

7 MR. DIGOU: St. Joseph's the day after the  
8 transaction on June 20, 2014, had no employees, no  
9 physical plans, no boxes. The only thing it maintained  
10 title to were its corporate records and that was  
11 specifically referred to in the contract. So when we  
12 were served with a subpoena, we contacted Prospect to  
13 gain access to St. Joseph's corporate records. When I  
14 say corporate records, I mean meeting minutes, board  
15 resolutions, annual reports, committee meeting minutes,  
16 things of that nature. All of the other documents  
17 Prospect purchased and owned pursuant to that asset  
18 purchase agreement.

19 THE COURT: But the first set of documents, St.  
20 Joseph's didn't even have those at the beginning?

21 MR. DIGOU: St. Joseph's didn't exist. It was on  
22 paper at a board. It was incumbent upon us to go and  
23 obtain those from Prospect at the hospital.

24 THE COURT: So you're talking shortly after the  
25 transaction you obtained those records?

1 MR. DIGOU: No, your Honor. There was a transition  
2 service agreement. Those boxes were at the hospital  
3 until October of 2017, November of 2017, when we obtained  
4 those in response to the subpoena.

5 THE COURT: Until you got the subpoena, the  
6 petitioner had no corporate records?

7 MR. DIGOU: That's right.

8 THE COURT: Why don't you continue, counsel.

9 MR. WISTOW: So my supposition appears to be  
10 correct. When they say that St. Joseph's just existed on  
11 paper, that's not true. Chace Ruttenberg was their  
12 counsel. They were operating in wind down. They were  
13 getting reports from the actuaries, and I'm going to get  
14 into that, regarding the pension plan and they had  
15 records. The records were physically at the hospital.  
16 It's not they didn't have records. The title of the  
17 records were there. The other records, which were so  
18 old, were in the same place, the same hospital. I don't  
19 know if they were in the same room or not, and they had  
20 contractual rights to those, period.

21 Now, one of the things that has been said is there  
22 was efforts to get these records and that's what the  
23 second subpoena is asking about. What did you do, just  
24 make a phone call to somebody? Is there a time record?  
25 I suppose the implication of what I'm saying is I don't

1 believe a lot of what is being said here. It's  
2 inexplicable to me that after all this time we are where  
3 we are.

4 Let me just go back, I don't want to burden the  
5 Court unduly here, but you can see from the 126-page  
6 response which was sent to the Court at around 4:30 last  
7 night how frustrating this thing is. We have no answers  
8 really for when we are going to get anything, and I would  
9 like to go through step by step because it's worse. The  
10 126-pages in itself is an indictment of the ones that  
11 prepared it, but it's worse than it appears. The  
12 original subpoena is more than eleven weeks ago and there  
13 is no dispute that very, very, very few documents have  
14 been produced with regard to that first subpoena. The  
15 responses that your Honor has are like shovelling smoke.  
16 It's the same thing I'm experiencing for months. I want  
17 to go through some of the pain that I experienced with  
18 the correspondence of trying to get to the bottom of all  
19 this.

20 By the way, basically the response that your Honor  
21 got -- and, I know, if I forgot something for the Court,  
22 I would be shaking in my boots. The response your Honor  
23 got is we're still working on it. We'll let you know  
24 when we're ready. This started, your Honor -- forgive  
25 me. I really want to put this on to the record because I

1 think it clarifies the necessity of going forward.

2 Behind all of this there is over 2,700 people whose  
3 pensions are going to be affected once way or the other.

4 We have right now, tentatively anyway, a February date  
5 for decision as to whether or not to cut the pension.

6 And, by the way, I'm going to take serious umbrage with  
7 something Mr. Lieberman said. He said I was being

8 inflammatory when I accused St. Joseph's of demanding

9 that there be a 40-percent cut in the pensions. I would

10 suggest part of the problem here is maybe people aren't

11 reading the papers in this case. That is exactly what

12 the petition asked for. It asked for a 40-percent

13 reduction. That's a big deal, Judge.

14 On November 6th, this is Exhibit 6 to my motion to  
15 compel. And at this point it's not even a motion to

16 compel. It's a motion to implore the Court to help me.

17 On November 6th, this is two days before the first

18 subpoena was due, and it's Exhibit 6. I wrote to Mr.

19 Land who had called and who had written to me about

20 giving time and I wrote and I said:

21 "Of course, we intend to cooperate with you in terms  
22 of timing of compliance. Nevertheless, I would point out  
23 the following:

24 A. You are already in arrears on your promise of  
25 giving us:



1           1. The accounting of the application of the assets  
2 subject to the Cy Pres. This was promised to us without  
3 regard to the subpoena. Because insuring the proper  
4 distribution of these assets was your responsibility from  
5 at least early 2015, we must insist you tell us when you  
6 intend to comply."

7           By the way, as I get into it, your Honor, not  
8 withstanding Mr. Lieberman's representation that they  
9 have complied, they have not. And I will hand up what  
10 they represent to be an accounting and it is not. And  
11 then I asked for an itemization currently in the hands of  
12 SJHSRI. Still nothing.

13           Then I said, "We expect at least partial compliance  
14 with the subpoena by November 8th, i.e. the date of its  
15 return."

16           This is critical, Judge. I'm not trying to keep  
17 their feet to the fire. Even though I think I would be  
18 justified considering the affect on the people here.

19           I said, "As to the additional time you may need,  
20 tell us what items require such and an estimate of when  
21 we can get full compliance as to each such item. I want  
22 to extend you every courtesy, but I need to remind you  
23 that there are over 2,700 people being adversely affected  
24 by the pension shortfall (some in potentially life  
25 changing ways). Please, let's try to work this out. But

1 I cannot accept general assurances."

2 So on November 9th and November 10th I got some  
3 papers. Really totally inadequate. On November 21st,  
4 this is a couple of weeks after those two productions,  
5 this is Exhibit 10, your Honor. I write to Mr. Land.  
6 Mr. Lieberman was not yet in the case. "Since your  
7 partial production of documents on November 9th and 10th  
8 we have not heard from you. Mr. Digou" -- am I  
9 pronouncing that correctly?

10 MR. DIGOU: Digou.

11 MR. WISTOW: "Mr. DiGou, counsel for SJHSRI,  
12 indicated in his e-mail of November 9th that forty boxes  
13 of documents were being scanned and bate stamped for  
14 production. When can we have them? When will your  
15 document production be complete? You are in arrears both  
16 as to the subpoena and the court order of November 27,  
17 2017."

18 That's the order which actually is directed to the  
19 individuals, it doesn't name them, but to turn these  
20 documents over. Then I get a week later in response to  
21 when will your document production be complete? You are  
22 in arrears. November 28th, I get a letter, Exhibit 13,  
23 and I have to burden your Honor. I want to read this  
24 into the record. "SJHSRI continues to collect, review,  
25 and process potentially responsive documents. SJHSRI has

1 requested access to documents owned by Prospect that may  
2 be responsive. Prospect continues to provide access to  
3 physical files, subject to Prospect's review of the  
4 documents for attorney client privilege, work product, or  
5 other applicable privilege/objection. With respect to  
6 Prospect's electronic data, we have discussed with  
7 Prospect collection of electronic data, and while we  
8 anticipate some difficulty in retrieving and searching  
9 the electronic data due to the broad scope of the  
10 subpoena requests, Prospects intends to provide access  
11 consistent with SJHSRI'S access to physical files subject  
12 to Prospect's review of the documents for attorney client  
13 privilege," et cetera et cetera.

14 I get that, and I sent an e-mail the same day. It's  
15 Exhibit 11. And it's telling them flat out. It's  
16 telling Land that Prospect has to give him access under  
17 the contract and I actually tell them look at page 62.  
18 By that time I read through the whole contract. Look at  
19 page 62. And what's very important is the access is for  
20 "investigative compliance, et cetera." What could be  
21 more applicable than what we're talking about?

22 I got to a point where I was so frustrated that I  
23 sent out the second subpoena saying, you know, instead of  
24 telling me you're trying, show me what the devil you've  
25 been doing.

1           Now, you heard Mr. Digou say that I interrupted  
2 their search for the first stuff while they were going  
3 through the records to show what they've been doing to  
4 comply with the first. And there is a written response  
5 saying there is no such record, I find that almost  
6 impossible to believe that that can be true. There has  
7 to be time records when somebody at least calls somebody.  
8 In a matter of this importance, is somebody going to  
9 suggest there is not an e-mail that somebody sent to  
10 Prospect saying look at page 62 of the contract. You  
11 know, we need this. We need that. It beggars belief  
12 that that could be true. There is a point that if this  
13 persists, I need to take somebody's deposition. I didn't  
14 want to do that. We've got enough things going on.

15           By the way, what is the second subpoena? How  
16 complicated is it? It says, "All documents in relation  
17 to the statements contained in the subject matter of the  
18 November 28th letter. That's the letter that says we're  
19 working, we're working, we're working. And it goes on  
20 and asks for three kinds of documents, communications  
21 with Prospect, Roger Williams, or CharterCare regarding  
22 compliance with the first subpoena. It looks for  
23 documents regarding the efforts of St. Joseph's Hospital  
24 to comply and it looks for documents they have regarding  
25 Prospect's efforts.

1           Then what I got is a late response to that subpoena  
2 with an unbelievable reply. I'm going to show you.  
3 There is no way to describe what they're doing. It's  
4 just cavalier. Listen to this response. This is Exhibit  
5 15, your Honor. "St. Joseph's Hospital, SJHSRI, is not  
6 in possession, custody, or control of any documents  
7 "relating to communications" with the identified entity.  
8 However, without waiving any of SJHSRI's objections,  
9 SJHSRI is in the process of undertaking a reasonable  
10 investigation to identify and produce non-published  
11 communications responsive to the request."

12           We don't have any but we're looking for them.  
13 That's what that says. Their objections, your Honor, on  
14 the subpoenas, both of the subpoenas, more importantly  
15 the first one, that we can't subpoena. We have to do a  
16 Rule 34 request for production. Your Honor expressly  
17 entered an order when the Receiver was appointed  
18 expressly saying we could subpoena anybody, any person or  
19 entity. And we point that out in our motion to compel,  
20 and in spite of that, when they responded to the motion  
21 to compel they made an issue again, just completely  
22 disregarded, not paying any attention to the fact your  
23 Honor ordered we can do subpoenas to anybody. Then we  
24 have the objections that were filed completely  
25 hypothetical, which we go through ad nauseam with the

1 bishop and with the attorney general that to the extent,  
2 objection; to the extent it's called for; to the extent  
3 that maybe we object.

4 And, your Honor, I don't want to insult you by  
5 telling you something that I know you know. You can't do  
6 that. That's not a valid objection. Then they're  
7 talking about privilege. No log. No log on any kind of  
8 privilege. Then they object under common interest  
9 privilege between that and St. Joseph's Hospital and they  
10 cite a totally inapplicable case from Magistrate Almond.  
11 The reason I say it's inapplicable is because in that  
12 case there were privileged communications. There was a  
13 privilege log. And the court said that sharing those  
14 privileged documents under these circumstances was not  
15 necessarily a waiver if there was a common interest, but  
16 there has to be an underlying privilege. You can't just  
17 say I have a common interest. As a purchaser and a  
18 seller, we have a common interest to transaction,  
19 therefore, any communications we have are privileged.  
20 It's ridiculous. There is no common interest privilege.  
21 The common interest doctrine enables the privileges, if  
22 they exist, not to be waived.

23 I already indicated how helpful it would be if  
24 counsel would read some of the documents in this case.  
25 For example, and not say that I was being inflammatory

1 when I said the petitioner was demanding a 40-percent  
2 reduction. I was also startled, absolutely startled,  
3 that Mr. Lieberman could represent to the Court that St.  
4 Joseph's was sole solicitors of these petitions in spite  
5 of my accusations of delay that they pay \$650,000 to fund  
6 this inquiry. That is absolutely wrong. Exhibit 18 are  
7 the two checks from Roger Williams to fund this. That's  
8 as a result of my insisting that we not deplete further  
9 the assets of St. Joseph's. And, by the way, that  
10 payment will have other consequences as we go along.

11 So what is this all about, your Honor? We have in  
12 the context of this reduction that is supposed to come up  
13 in February. They waited to file the objection to the  
14 current motions under eleven days after we filed the  
15 motion and filed it on New Year's Eve, a typical delay  
16 tactic. Look at what we supplied the Court with so far  
17 about the delays of St. Joseph's Hospital, pre-conversion  
18 in 2014, pre-conversion. They knew, they knew, they  
19 knew, your Honor, that they would run out of money on  
20 this plan with, believe it or not, when they ran out of  
21 money on the actuarial projections, another 60 years of  
22 payouts to be made even after the \$14 million that we  
23 knew about went in. And that, your Honor, is Exhibit 19.  
24 I produced that.

25 And, by the way, what is interesting about that,

1 your Honor, is they knew they would run out of money with  
2 the \$14 million. But if you look at what I supplied,  
3 they were projecting paying the next year, 2015,  
4 \$1,391,000 and then a million and so forth. For the  
5 first several years over a million dollars and then,  
6 apparently, from the Cy Pres money -- I shouldn't say the  
7 Cy Pres money -- from charitable funds, the endowments.  
8 They were going to pay a minimum of \$600,000 a year after  
9 the first few years when they were paying over a million.  
10 None of that happened, none of that. So they knew at  
11 least -- I don't want to get into it. They knew way  
12 before that, but at least in 2014 before the closing they  
13 knew the plan was dead. It could not fulfill the  
14 promises that were made.

15 And, by the way, in what I've attached in Exhibit  
16 19, the total after the \$14 million that they were saying  
17 were going into the plan is about \$19 million, not a  
18 penny of it has gone in. And, by the way, that document  
19 that I attached, I didn't get it from these guys. I got  
20 it from Andrew. Now, they knew, when I say they knew,  
21 I'm talking about Mr. Land personally knew Exhibit 20  
22 that some of the "plan participants" were as young as 25  
23 to 29 years old. And that they had designated  
24 beneficiaries who would get something after they died.  
25 What we're talking about, your Honor, is a plan which on



1 its face would run out of money and there would be  
2 literally 60 years of unpaid benefits, not huge but a  
3 long period of unpaid benefits.

4 So what happened? December, 2014, Exhibit 21, I'm  
5 talking about the delay. Three years ago, December 14,  
6 2014, CharterCare authorized the winding down and  
7 "negotiations with participants and their reps of the  
8 pension plan," and who was to do it, Exhibit 21, Dan Ryan  
9 and Land. February 2, 2017, a little more than two years  
10 later, they reiterated. This is Exhibit 22 that the  
11 corporation and Land was to wind this thing down. When  
12 do we hear about this? We hear about this six months  
13 after that and almost three years after the original  
14 authorization for winding down and to negotiate a  
15 petition. We hear about it in August of 2017, almost  
16 three years after they were told to wind it down. And  
17 this is beggars belief.

18 So after sitting on this for these years, they file  
19 a motion to put this thing into receivership and in the  
20 motion ask that on October 11th it be set down for  
21 hearing on what they want, the reduction of 40 percent.  
22 They have been diddling around. I don't know how else to  
23 say it. Forgive me for the vernacular. They have been  
24 diddling around with this thing for years. Now they say  
25 to these people we propose to and we're going to ask the

1 Court to reduce you and you have a couple of months to  
2 figure out what this is all about. Lot's of luck. I  
3 have been working on this for months. I can't figure out  
4 what they're up to. I can't get the documents. I can't  
5 get anything.

6 On December 12th of 2017, Exhibit 23, I get a letter  
7 now from Mr. Lieberman, and he affirms and offers that  
8 there are 79 boxes, 45 from St. Joseph's Hospital, 34  
9 from Prospect that very same day. By the way, let me  
10 say, your Honor, that I would be surprised if we got any  
11 kind of communication in this case from anybody and  
12 didn't respond either that day or the next day or the  
13 next business day. We have really taken this thing  
14 seriously. Whether we have done a good job or not, I  
15 don't know but we tried to move this.

16 Here is what Sheehan said in response to this, we  
17 got 79 boxes. This is critical. This goes to the heart  
18 of where we are going. "We do not agree to your proposal  
19 to have Prospect turn over to us scores of boxes of  
20 documents on behalf of your client without your client  
21 making any attempt" -- this is Exhibit 24, your Honor --  
22 "making any attempt to determine if it contained  
23 privileged and confidential material or even if the  
24 documents are responsive to the subpoena. And with your  
25 client having the right to make that determination and

1 seek to have privileged documents returned and disclosure  
2 of confidential documents limited."

3 What I'm worried about, your Honor, and I believe  
4 what is going on here is I got a call a while back that  
5 precipitated the letter of 79 boxes from Mr. Lieberman,  
6 who was obviously going to do a document dump on me that  
7 was going to paralyze my office and I would get boxes and  
8 boxes of whatever the corporate documents were, whether  
9 they were responsive or not, and whatever Prospect's  
10 documents were responsive or not. And we said in that  
11 same letter, your Honor, and this becomes relevant  
12 especially of confidentiality. We said in the letter,  
13 "Finally we see no need for the protective order  
14 concerning allegedly "confidential documents" since we do  
15 not understand how a corporation wind down has any  
16 legitimate claims for or interest in confidentiality.  
17 Nevertheless, out of the spirit of corporation and  
18 accommodation we will agree to the entry of a protective  
19 order under the terms attached hereto."

20 A couple of things we want to do. We don't want  
21 just some blanket denomination of confidentiality. We  
22 asked them in the protective order -- we want them to say  
23 this document is confidential and why. It startles me  
24 that anything to do with this pension plan could possibly  
25 be confidential as to the thousands of people affected by

1 it and who have a right to know. I think Mr. Del Sesto  
2 wants to put on his website whatever documents are  
3 available. There is a great deal of public interest in  
4 this case and to claim confidentiality about something  
5 that affects these people, it's bizarre especially since  
6 the petitioner is saying we want to cut their benefits by  
7 40 percent, but we got all this confidential stuff.  
8 We're saying fine, you want to make it confidential,  
9 we'll make it confidential, but you have to specify as to  
10 each document why it's confidential, why it's a serious  
11 problem for you and not just claim confidentiality.

12 The other thing is we want to be able if we get a  
13 subpoena, for example, or we get a request from the A.G.  
14 or some agent, to be able to turn the documents over to  
15 any governmental agency and not have to come back here  
16 and say we just got subpoenaed. Will you please quash  
17 the subpoena? What we're happy to do is notify them if  
18 we get something like that but they're going to have to  
19 get the request to quash, not us.

20 Now, this business about the document dump, I am 99  
21 percent sure that is what we got looking at us. There is  
22 case law on this. This isn't the first time this has  
23 come up. I refer your Honor to Govas vs. Chalmers, which  
24 is at 965 F.2d 298, which is a '97 Circuit case. In that  
25 case the plaintiff produced approximately 9,000

1 documents, without attempting to categorize them or  
2 relate the documents to discovery requests. Because of  
3 prior dilatory conduct the District Court dismissed the  
4 Plaintiff's claim as a sanction under the Federal Rule of  
5 Civil Procedure 37C. The court of appeals held a  
6 dismissal was an appropriate sanction because the  
7 plaintiff had demonstrated a dilatory evasive discovery  
8 act. Now that's 9,000 documents. They're talking about  
9 -- I don't know how many thousand when you get to 79  
10 boxes. And we would like them to respond to the subpoena  
11 and not just say here is a wall of boxes.

12 By the way, there is another case I'll refer to  
13 Rothman vs. Emory University, which is at 123 Fed.3d 446  
14 where, and I'll quote from, "During arduous discovery  
15 process in this case the District Court ordered Rothman  
16 to produce certain documents that are required by federal  
17 rules. In response, Rothman produced three large  
18 banker's boxes of college papers and numerous other  
19 unrelated nonresponsive materials. Accordingly, the  
20 District Court sanctioned Rothman for violation. Now,  
21 that's three boxes. They're talking about 79 boxes.

22 Finally, your Honor, one other from the Northern  
23 District of Illinois, In Re: Thomas Consolidated  
24 Industries, 2005 Westlaw 3776322. And in that case the  
25 federal rules allowed the trustee to produce the

1 documents as they are kept in the ordinary course of  
2 business. He remained obligated to sort through the  
3 documents himself and then produced only those responsive  
4 to the document request. And they cited an earlier case  
5 the Rothman vs. Emory that I had previously cited.

6 THE COURT: Counsel, I'm well aware of under Rule 45  
7 as well the option in terms of how things can be  
8 produced. The reason I said I'll deal with Attorney  
9 Lieberman is they made their election. They sent three  
10 supplemental responses.

11 MR. WISTOW: Okay. I am finishing up, your Honor.  
12 I thank your Honor for your patience. My excuse for this  
13 is it gives me an opportunity to vent and I really need  
14 that. The response to the Court's inquiry, 126 pages  
15 really logs nothing. The statement that they gave us, an  
16 accounting of the Cy Pres, I would like to hand up to  
17 your Honor what they didn't give to us.

18 THE COURT: You can hand it to the clerk. She'll  
19 mark it. If you can mark it Court's Exhibit One.

20 (Exhibit so marked.)

21 MR. WISTOW: This is what we were given which is  
22 allegedly the accounting. If your Honor will take a look  
23 at this, you will see that there is only two entries that  
24 relate to Rogers William, and that's the last two on the  
25 page and the reason I say that is because if you look at

1 the rest of the thing, you will see that everything else  
2 is Rogers Williams. There is two items. They total  
3 about a million four. There were millions and millions  
4 of dollars and that were involved in the Cy Pres from St.  
5 Joseph's. This only addresses about \$1.4 million and, by  
6 the way, it's incomprehensible. If you look at what I  
7 gave you, it doesn't tell you anything about where it  
8 came from. I had to go through further investigation.  
9 They have records about this. They have to have records  
10 about this.

11 And, by the way, one of the reasons that this Cy  
12 Pres is so important is we think that not only were there  
13 representations made that money would come from  
14 endowments and we showed your Honor that.. but even if  
15 there wasn't such representations, we think that  
16 creditors of which we believe we can prove that these  
17 plan participants or creditors have rights to  
18 unrestricted charitable gifts and we think that a lot of  
19 this applies. When I say unrestricted, what I mean is it  
20 says use the income only. That's not a restriction that  
21 keeps creditors. If it says use it only to have an x-ray  
22 lab somewhere, that may be a different story. But there  
23 is still millions and millions of dollars that need to be  
24 accounted for that while we may be able to go after  
25 CharterCare Foundation, another one that is mentioned

1 here is the Rhode Island Community Foundation account got  
2 a lot of money, but this is only a partial list. These  
3 are all important things.

4 I am not asking for these things because I enjoy  
5 reading these complex documents or researching the law on  
6 when can charitable payments be applied to satisfy  
7 creditors. In the 126-page document -- and by the way,  
8 on the Cy Pres, Exhibit 10 is a letter from me to Rick  
9 Land after I get this so-called accounting. By the way,  
10 these numbers, these bate stamp numbers indicate that  
11 they are within the first two productions, November 9th  
12 and 10th.

13 On Exhibit 10 we say, "Dear Rick, since your partial  
14 production of documents on November 9th and 10th we have  
15 not heard from you. Mr. Digou indicated in his e-mail of  
16 November 9th that 40 boxes of documents were being  
17 scanned and bate stamped for production. When can we  
18 have them? When will the document production be  
19 complete? You still have not provided the accounting  
20 from Cy Pres that you promised to get us." Now, they  
21 tell the court in 126 pages that our subpoena requests  
22 are so vague that they really can't figure out what we're  
23 talking about. They nevertheless attempt to figure it  
24 out in response.

25 Let me tell your Honor about this vagueness issue,



1 and I would like to hand up to the court -- I thought I  
2 had extra copies. What this is, your Honor, is a letter  
3 that -- I do have one other copy. This is a letter that  
4 I wrote to Mr. Land on November 8th and this is on the  
5 issue of what does my subpoena ask for and is it clear or  
6 is it vague? And if I might --

7 THE COURT: Court's 2.

8 (Exhibit so marked.)

9 MR. WISTOW: So rather than read it into the record,  
10 I just ask your Honor to read it to save time.

11 THE COURT: Okay. Go ahead, counsel. I had the  
12 opportunity to review it.

13 MR. WISTOW: Whenever we were asked what does this  
14 mean, we responded in writing. Nobody came back and said  
15 we still don't understand what you're talking about. We  
16 were satisfied we had answered the question. We're a  
17 little surprised to hear now about vagueness. Now,  
18 another thing that is very disturbing, very disturbing,  
19 in 126 pages, which is a essentially boiler plate. It's  
20 probably four or five pages, if that, of real responses.  
21 Everything is just repeated over and over.

22 One of the things they say is why am I asking them  
23 for these documents. Mr. Del Sesto has them as the  
24 Receiver, because of Mercer and Angell and so forth. A  
25 couple of things, we have gotten production from Mercer

1 and Angell and some of the things that we wanted we got  
2 from them. I pointed one out and actually used it this  
3 morning. I'm not satisfied that they have everything  
4 necessarily and I don't know that there is a  
5 justification that a party can say somebody else has it.  
6 Go get it from them. I want to make sure that people  
7 are not withholding stuff and I may subpoena the same  
8 thing from ten people. And by the way, Angell and Mercer  
9 are new to this. They haven't been involved for that  
10 many years so they don't have all of this stuff. If you  
11 would bear with me for one moment, your Honor.

12 THE COURT: It looks like you're heading toward the  
13 end.

14 MR. WISTOW: I can verify that I'm on my very last  
15 page. I picked out a couple of things within 126 pages.  
16 I don't want to go through the whole thing.

17 THE COURT: I've read it.

18 MR. WISTOW: I know, your Honor, as patient as you  
19 are is not going to let me. Take a look at page 71,  
20 there is a disc on the application of Cy Pres. They have  
21 it, but, you know what, Prospect doesn't agree on its  
22 release. So what. What does Prospect have to do with  
23 this in the first place on the merits of what happened to  
24 the charitable assets of Roger Williams and St. Joseph's?  
25 And even if they have something about it, how do you get

1 them to resist the subpoena by saying the other guy  
2 doesn't want me to give you the disc that I have? The  
3 response that they have given us actuarial reports for  
4 2014 and 2016. It's on page seven.

5 What are we talking about? We're talking about a  
6 plan that goes back to 1965. I can understand if they  
7 said, hey, we don't have any of the documents from '65.  
8 They probably should, but I can understand if they don't.  
9 To say we're giving you reports from 2014 forward. What  
10 is that? They don't have any of the records regarding  
11 the actuarial reports before 2014, and then they say  
12 Prospect is in possession. Why is Prospect in possession  
13 of the actuarial reports? Prospect didn't pick up the  
14 pension. They expressly said we don't want any part of  
15 it. Why are these guys saying it, not to me now, but to  
16 the Court that Prospect has all of these documents?

17 Then on page 101, this is just random, we ask them  
18 for any records they have relating to the allegation they  
19 made in paragraph seven of the complaint that they have  
20 been informed and believe that this plan will cease to be  
21 a church plan on or before December 31, 2018. And  
22 indeed, that is given as one of the reasons, if not the  
23 reason, for the petition. That says we won't have the  
24 money to pay the premium. We don't have the money to  
25 satisfy ARISA. I said give me the records related to

1 that. You know what the answer is? There are no  
2 records. If that is not a staggering statement --  
3 especially, by the way, when they have admitted that  
4 there is boxes and boxes and boxes they haven't reviewed.  
5 And, yet, they have no problem saying to your Honor there  
6 are no records relating to that.

7 So where do we end up? Here is what I would like to  
8 do. I throw myself on the mercy of the court. Help us  
9 do this. I'm not going to ask for sanctions this morning  
10 because I don't want sanctions against St. Joseph's  
11 Hospital. I want St. Joseph's Hospital to have as much  
12 assets as possible at the end of the day. I will ask  
13 that the issue of sanctions be put over until we know  
14 what we are going to get and that those sanctions -- I am  
15 reluctant to say this because they have gentlemen on the  
16 other side, and I ordinarily do not make personal attacks  
17 on the lawyers, but I don't feel we have been played with  
18 in an honorable way considering, not me, don't be nice to  
19 me, but the people who are looking at this plan, 2,800 of  
20 them. I ask that the issue of sanctions be put over.

21 THE COURT: Thank you, counsel. You may approach  
22 the lectern. You may be heard.

23 MR. LIEBERMAN: Good morning, your Honor. I  
24 appreciate the opportunity. Number one, I will only  
25 address the issues before the Court. Two, I'll try not

1 to vent. If I do, I apologize. Three, everything we  
2 told the Court is to the best of our knowledge the truth  
3 and it's complete and only the truth. And we are as  
4 interested in protecting the beneficiaries as anyone in  
5 this courtroom.

6 THE COURT: I would think so. Because you were the  
7 one who came to the court and said you need to take this  
8 over.

9 MR. LIEBERMAN: That's correct, your Honor.

10 THE COURT: Part of your corporation.

11 MR. LIEBERMAN: We made no demand that there be a 40  
12 percent reduction. Your Honor will recall at the  
13 conference it was discussed between and Mr. Land and  
14 others that the Court would appoint the Receiver and the  
15 Receiver would recommend what should be done.

16 THE COURT: I don't want to get into that because  
17 that is not my recollection, but please proceed.

18 MR. LIEBERMAN: Okay. Your Honor, Mr. Wistow  
19 suggested somehow we are withholding documents from the  
20 Cy Pres. This is Exhibit Number 35, page 73, "All  
21 documents, including accounting records relating to  
22 transfers or dispositions of assets that are or were the  
23 subject of any Cy Pres petition." We advised the Court  
24 what documents we had. We bates stamped them. Mr. Wistow  
25 is disappointed that we don't have more documents. I am

1       sorry, Mr. Wistow --

2               THE COURT: Reading the papers, they may be in the  
3 37 boxes. We don't know.

4               MR. LIEBERMAN: We doubt that very much, but we  
5 don't know. What we know, we gave them. We can't create  
6 documents. If he's disappointed there are no more,  
7 that's something that can't be helped. As to the no  
8 records comment about the second subpoena, Mr. Wistow  
9 referred to our submission to the Court just recently  
10 that only addressed the first subpoena. There is  
11 absolutely no reference to the second subpoena. For Mr.  
12 Wistow to say that we said there is no documents  
13 responsive to the second subpoena as set forth in the  
14 memorandum we just recently received is in there.

15               Number two is we didn't say there is no documents  
16 responsive to the second subpoena. There are three  
17 categories. We only said there are no documents in  
18 responsive to paragraph number one, and what we said was  
19 there were no documents relating to communications. We  
20 didn't said there were no documents comprising  
21 communications and that's what we're looking for.

22               As to the funds, your Honor, I believe you will  
23 recall there was discussions how the funds, the \$14  
24 million, would be paid by Roger Williams with St.

25               Joseph's approval. All the funds that Roger Williams had

1 would eventually be given to St. Joseph's.

2 THE COURT: You would admit there was an error in  
3 your papers. It should have said Roger Williams. Okay.  
4 Let move on.

5 MR. LIEBERMAN: It's not like we were  
6 misrepresenting something.

7 THE COURT: Like I said, let's get to the motion.

8 MR. LIEBERMAN: Even as much as my request for the  
9 Court for delay for this hearing, I have come in very  
10 recently in this matter. I will try and get up to speed.  
11 With the Christmas holiday, that's why I am requesting  
12 the delay and that's the only reason.

13 THE COURT: You know what, what I heard from today  
14 is the attorneys from the beginning that are still the  
15 attorneys. Chace Ruttenberg has been involved in the  
16 beginning.

17 MR. LIEBERMAN: And they have, your Honor. There is  
18 no document dump, your Honor. We have a vast number of  
19 documents.

20 THE COURT: Help me understand that. We're talking  
21 about 37,000 plus pages of documents that what you're  
22 saying is we haven't reviewed them yet. We don't want to  
23 review them now. We will review them in -- I guess in my  
24 request when and I didn't get an answer to that, but,  
25 okay. And we haven't reviewed to see what they're

1 responsive to. We haven't reviewed for privilege. We  
2 just want to deliver all the boxes subject to something  
3 in the future. Why is that not a document dump?

4 MR. LIEBERMAN: That's not a document dump. Those  
5 cases talk about document dumps. I have been involved in  
6 those types of cases where you invite opposing parties to  
7 come to a warehouse with thousands of documents. Those  
8 days are over. We have a thumb drive. We told Mr.  
9 Wistow we'll give them a thumb drive with all the  
10 documents. He can do a search on that thumb drive. You  
11 put in the relevant word and he can identify quite  
12 readily what documents he wants. You would think with  
13 Mr. Wistow's concern about how acting in good faith,  
14 withholding documents, delaying, that he would want all  
15 the documents and not trust us to identify the responsive  
16 documents.

17 THE COURT: So you're saying it's relatively easy  
18 with a thumb drive?

19 MR. LIEBERMAN: Yes.

20 THE COURT: So you can do it in what, 48 hours?

21 MR. LIEBERMAN: I'm not sure he can do it that  
22 quickly, your Honor, but what I'm suggesting to the Court  
23 is he will have all the documents.

24 THE COURT: I understand that. Fine. So you can  
25 give him a thumb drive, but you've got a couple or a few



1 days, since it's so easy to do, to break it down to the  
2 61 categories and tell me what's privileged and what is  
3 not.

4 MR. LIEBERMAN: What we suggest is we will give him  
5 the thumb drive and within 25 days we will designate  
6 documents that are privileged and confidential.

7 THE COURT: I saw a letter from yourself or  
8 Attorney Land that talked about that and it's more than  
9 the 20 or 25 days right now. Why I was asking Attorney  
10 Digou the question, what have you been doing?

11 MR. LIEBERMAN: We have been doing a lot, your  
12 Honor. We have been doing a great deal.

13 THE COURT: With respect to the first subpoena?

14 MR. LIEBERMAN: With respect to the first subpoena  
15 and with respect to the second subpoena.

16 THE COURT: The first subpoena, I understand your  
17 position was we should have 40 days. Fine. My concern  
18 is what has happened now is 50 some odd days since your  
19 production, you need 20, 25 days to review the documents.  
20 Why didn't you review them?

21 MR. LIEBERMAN: We are constantly, almost on a daily  
22 basis, in the process of reviewing documents.

23 THE COURT: When you represented before all you  
24 reviewed is what you produced plus not even all the  
25 electronic documents.

1           MR. LIEBERMAN: That review has been going on, your  
2 Honor. We didn't have the -- I am uncertain of the  
3 dates. I don't want to misrepresent to the Court. We  
4 didn't have all the documents scanned until much later  
5 than it would appear because it was up with the vendor.  
6 When they got finished scanning it, then we turned it  
7 over on the thumb drive. It's not like we had them in  
8 early November.

9           THE COURT: I don't believe you were here, but I had  
10 a representative from the Attorney General's Office. You  
11 know what? They expedited the scanning. They got it  
12 done. They have gone through tens of thousands of  
13 documents. They have identified privileged. They have  
14 identified confidential. I'm just trying to understand,  
15 looking at it through your lens, why you have not gone  
16 through anything other than those very few documents?  
17 You have been through privileged reviews before. I know  
18 that your co-counsel has been through them before. You  
19 don't have employees so you hire a couple of document  
20 review attorneys and you go through it. They have 14  
21 lawyers. You have four lawyers at your firm. Explain.

22           MR. LIEBERMAN: First of all, St. Joseph's has no  
23 employees, your Honor.

24           THE COURT: Wait a second. I read that the papers.  
25 They have Attorney Land, who is a partner in a firm with

1 14 lawyers.

2 MR. LIEBERMAN: Yes, they have attorneys, but they  
3 really don't. It's essentially a paper corporation at  
4 this time.

5 THE COURT: If it's a paper corporation, the easiest  
6 thing for me to do is just to take the St. Joseph's  
7 Corporation, the paper corporation, merge it into and  
8 I'll appoint Del Sesto and give him authority over it.

9 MR. LIEBERMAN: If your Honor wishes, we can hire a  
10 contract lawyer to go through the materials to identify  
11 the privilege and confidential. What we were hoping is  
12 we would get them in this thumb drive and special counsel  
13 would have all the documents. That's what he's seeking,  
14 all the documents. He would have them immediately.

15 THE COURT: What about the fact that Attorney Land  
16 on November 8th, November 9th did exactly what he should  
17 have done. He made an election and said, I'm going to  
18 respond to each of the 61 requests. I'm going to tell  
19 them the bate numbers of those requests. Your client put  
20 this thing into receivership. Isn't that the most  
21 efficient way to do it? Aren't you in a better position  
22 to determine based on the categories where these  
23 documents belong?

24 MR. LIEBERMAN: That's what we proposed. After we  
25 gave the documents to special counsel --

1 THE COURT: I guess my question is different. Why  
2 isn't it done now?

3 MR. LIEBERMAN: Because we have been working  
4 constantly on reviewing documents and identifying  
5 privileged documents, confidential documents.

6 THE COURT: So you have been doing it?

7 MR. LIEBERMAN: The documents that we have reviewed,  
8 absolutely. We haven't ignored it.

9 THE COURT: But you haven't touched the 37 boxes  
10 because there was the hope the Court would approve your  
11 protective order and say just give them all the  
12 documents.

13 MR. LIEBERMAN: No. We would give special counsel  
14 all the documents. In view of the cynicism about our  
15 conduct, he would be more comfortable getting all the  
16 documents rather than relying on us.

17 THE COURT: I'm talking about what is the normal  
18 process as far as the document production, which is you  
19 identify and gather the documents, just what I asked,  
20 then you have them scanned and bates stamped and then you  
21 go through the privilege and confidential review and you  
22 turn over what is not privileged or have it stamped  
23 confidential. You give them a privilege log and  
24 everything other than attorney client, maybe even that at  
25 some point. You give a bench copy of all of the

1 documents in the log to the Court so I can make a  
2 decision whether it was done in good faith or not and  
3 whether was there is an exception especially on work  
4 product of whether there is a need to turn it over. It's  
5 not that complicated.

6 MR. LIEBERMAN: I'm not suggesting it's that  
7 complicated. I'm telling you we have been working  
8 diligently. We have been operating in good faith.

9 THE COURT: If I was to say to you today I want you  
10 to go through all of the documents, do a review, do a  
11 privilege log, mark what you believe in good faith is  
12 confidential, and turn it over and I'm saying if you need  
13 to hire a document review attorney, you hire them to do  
14 it. Because, quite frankly, it's probably going to be an  
15 hourly rate that is much less than the partners and  
16 associates charge in the firm. How long will it take?

17 MR. LIEBERMAN: May I just confer?

18 THE COURT: I want to know is it two days, four  
19 days?

20 MR. LIEBERMAN: Your Honor, I've been educated  
21 somewhat. I am told although documents are scanned,  
22 apparently, if there are handwritten notations it doesn't  
23 show up in the scan. So, therefore, I am advised by my  
24 fellow counsel, someone would have to look at each and  
25 every page in the boxes to make sure that all the

1 documents were reviewed and identified.

2 THE COURT: So you need to do a paper review?

3 MR. LIEBERMAN: And I am told it would be about four  
4 weeks.

5 THE COURT: Counsel, I will hear from you  
6 afterwards.

7 MR. LIEBERMAN: I am told even if we start  
8 immediately to retain contractors it's going to take some  
9 time. I am told about three or four weeks to do that.  
10 Excuse me. I am further educated. The handwritten  
11 documents are not text searchable so you couldn't take  
12 the thumb drive and be certain that you got or identified  
13 documents which had handwritten notations.

14 THE COURT: And it would have been so easy for him  
15 to do it. You told me it was on a thumb drive and  
16 searchable and now it's not.

17 MR. LIEBERMAN: Right.

18 THE COURT: Okay. You're learning. So you're  
19 saying three to four weeks and we're talking about 37 or  
20 so boxes. Have they been scanned?

21 MR. LIEBERMAN: Of the boxes, I think, most are  
22 scanned. We were advised there were ten more boxes just  
23 a few days ago, maybe two or three days ago we were  
24 advised there were ten more boxes that are going to be  
25 scanned so.

1 THE COURT: I don't know who your vendor is but when  
2 the Court said come back in three days to the attorney  
3 general with their boxes, miraculously they got them  
4 scanned. I would implore you to contact your vendor when  
5 you leave and say the Court wants it done.

6 MR. LIEBERMAN: Absolutely, your Honor, certainly.

7 THE COURT: So you're saying it's going to take  
8 three or four weeks to do a document review, identify  
9 privilege, confidential documents, and do a privilege log  
10 so it can be served on counsel?

11 MR. LIEBERMAN: Yes, sir.

12 THE COURT: Okay. Help me understand these other  
13 documents. It sounds like you have them, you don't have  
14 them anymore, the Prospect?

15 MR. LIEBERMAN: The Prospect documents we had  
16 pursuant to a contract the right to ask for access to  
17 them. When we got the subpoena, we did ask and Prospect  
18 agreed and then when the subpoena on Prospect was served  
19 on December 4th, Prospect realized it was going to have  
20 to produce documents so it took back its documents so it  
21 could review those documents to respond to the subpoena.  
22 So we no longer have access to Prospect's documents. It  
23 seems wasteful and counterproductive --

24 THE COURT: I looked at least at the paragraph of  
25 the asset purchase agreement, you wouldn't dispute that

1 you still have a right to seek them. You're saying they  
2 gave them to you and then they said we want to take them  
3 back.

4 MR. LIEBERMAN: We did ask for them.

5 THE COURT: I know that, and you took them. And  
6 then they said we want them back and somehow you're  
7 saying, therefore, they are not under your custody or  
8 control anymore. That A.P.A. section goes away because  
9 they said they want them back.

10 MR. LIEBERMAN: They are not in our possession.  
11 They are in the control and possession of Prospect.

12 THE COURT: You have a contractual right to those.

13 MR. LIEBERMAN: I would suggest to the Court not an  
14 unfettered, unlimited right to demand access to  
15 documents. When Prospect was served with a subpoena, we  
16 would be interfering with their obligation to respond to  
17 the subpoena.

18 THE COURT: You know, Attorney Cavanagh is not here  
19 today but he was before the Court and maybe you can talk  
20 to him about the process. They did a miraculous job of  
21 reviewing 17,000 pages of documents within a very, very  
22 short period of time. And what they had done is they  
23 scanned them in and they reviewed them. Have you  
24 contacted Prospect and how they took boxes and scanned  
25 and bated stamped?



1 MR. LIEBERMAN: I am unaware they scanned them, your  
2 Honor. I understood they were going to scan them. That  
3 was the last communication I had with them about that.  
4 They had taken the boxes and they told us they were going  
5 to get them scanned.

6 THE COURT: When was that?

7 MR. LIEBERMAN: Excuse me?

8 THE COURT: When was that?

9 MR. LIEBERMAN: I don't want to misrepresent to the  
10 Court.

11 THE COURT: Was it November?

12 MR. LIEBERMAN: No, no. It was after December 15th.  
13 It was fairly recently.

14 THE COURT: Okay. Go ahead. What else?

15 MR. LIEBERMAN: If I might, your Honor, with the  
16 Court's permission, I would like to address the issues  
17 before the Court, the motion, and not talk about a claim  
18 against St. Joseph's. We're not here to discuss that.  
19 And with respect to the procedure and the merits, number  
20 one, under our Superior Court rules there is a duty to  
21 confer and try to resolve things. When I asked Mr.  
22 Wistow's permission to discuss the first subpoena, he  
23 said absolutely not. We are only going to discuss the  
24 second subpoena. So we didn't have a meet and confer.  
25 In addition to that, there is a requirement for the Rule

1 37 certification, which was not filed with the court,  
2 perhaps because Mr. Wistow refuses to talk to me about  
3 the first subpoena. So from a procedural matter, the  
4 motion is defective and for that reason alone it should  
5 be denied.

6 THE COURT: I understand this was a request for  
7 production but under Rule 45 for a subpoena.

8 MR. LIEBERMAN: This is a Rule 37 requirement, your  
9 Honor, not a Rule 45.

10 THE COURT: I understand that but does that apply to  
11 a subpoena?

12 MR. LIEBERMAN: Absolutely, your Honor. As we  
13 mentioned in our brief, this is Professor Kent's  
14 treatise and --

15 THE COURT: Not the Professor Kent. Your reference  
16 about you believe they should have done it through a  
17 request for production of documents.

18 MR. LIEBERMAN: I didn't say they should have done  
19 it but the way they did it. As Professor Kent and  
20 Supreme Court Justice Flanders explained in 45.3 of their  
21 treatise, if a party is served with only a subpoena and  
22 not a notice of deposition, there wasn't a notice here,  
23 then under those circumstances, the procedures set forth  
24 in Rule 34 control, not the procedures in Rule 45. The  
25 procedure under Rule 34 is a written response has to be

1 served. We did that. It has to be served within 40  
2 days.

3 THE COURT: I understand that, it's your position  
4 now after at least the first subpoena responses given in  
5 two supplemental responses, and I think you did raise in  
6 the second subpoena that this should have been a Rule 34  
7 and there shouldn't have been a subpoena because you, as  
8 a petitioner, are a party. Correct?

9 MR. LIEBERMAN: No, I didn't say that. I said if  
10 special counsel wants to avail himself of Rule 45, he can  
11 and he can serve a subpoena. If he does that and he  
12 doesn't serve a notice of deposition, then the  
13 requirements of Rule 34 control.

14 THE COURT: I guess you were not here for my  
15 colloquy on the record when I issued the expanded power  
16 to the Receiver in terms of a subpoena; correct?

17 MR. LIEBERMAN: I read your Honor's order.

18 THE COURT: I saw that you -- I think this is what  
19 the judge meant.

20 MR. LIEBERMAN: The language of the order is clear.  
21 It says that special counsel can serve a subpoena and he  
22 did. But your Honor didn't say and I don't understand  
23 your Honor to say that you were amending or redoing the  
24 Rule 45 and 34 so he exercised his right. He had that  
25 power to serve a subpoena without your Honor's order.

1 THE COURT: I heard enough. When I issue my  
2 decision, I will address that issue.

3 MR. LIEBERMAN: Okay. So we did respond. In  
4 addition, under Rule 34 a party is not required to  
5 produce documents within 40 days. The party only has to  
6 produce or serve a written response, which we did. So we  
7 complied with Rule 34. We did more than comply with Rule  
8 34. We also provided documents. It's not like we tried  
9 to evade our responsibility. We went over and beyond the  
10 requirements of controlled Rule 34 and provided the  
11 documents.

12 I must say because in the papers of Mr. Wistow I  
13 represented to the Court that on December 18th and I was  
14 sitting here Mr. Wistow admitted to the Court that he had  
15 not read our papers. That was over a month after we  
16 produced the documents, he still had not read our papers  
17 and told the Court that.

18 As to the second subpoena, your Honor, and we  
19 responded timely to the second subpoena.

20 THE COURT: Without a privilege log.

21 MR. LIEBERMAN: We hadn't yet reviewed all the  
22 documents. So we were in the process of reviewing those  
23 documents and upon completion of the review of those  
24 documents to the extent there were any, we would provide  
25 them. To the extent there were documents that were

1 privileged, we are going to withhold those documents and  
2 provide a privilege log, your Honor. And Mr. Wistow said  
3 that we represented that we didn't have any such  
4 documents in the recent submission. We didn't address  
5 the second subpoena in the recent submission so we  
6 couldn't say and didn't say we didn't have such  
7 documents. There were three paragraphs in the second  
8 subpoena. The only reference to not having documents was  
9 to the first request. The first request has all  
10 documents relating to communications.

11 THE COURT: Where are you at in gathering and  
12 reviewing responses for the second subpoena?

13 MR. LIEBERMAN: May I? Mr. Digou.

14 THE COURT: I will tell you that I read the  
15 responses and I misunderstood because I didn't pick up  
16 when you talked about relaying that you weren't talking  
17 about all of the documents being requested, so I put it  
18 aside and I said, okay, they don't have that. Counsel.

19 MR. DIGOU: Thank you, your Honor. In that regard  
20 that's a very distinctive point to make here relating to  
21 communications. It's not, as far as I have been  
22 involved, it's not my practice to make a memo of sending  
23 an e-mail. So there is not a document relating to an  
24 e-mail.

25 THE COURT: You understand in some circumstances

1           there are.

2           MR. DIGOU: Right.

3           THE COURT: I understand just that piece you don't  
4 have, but what about the others?

5           MR. DIGOU: So we use Outlook as our e-mail server.  
6 We have searched, based on dates and parties' names for  
7 all e-mails on our Outlook server that relate to the  
8 efforts of the first subpoena and there are a number of  
9 parties involved in our office internally. So our  
10 efforts have been focused on searching the Outlook  
11 e-mails, identifying the e-mails, and reviewing the  
12 e-mails.

13          THE COURT: So have you gathered them at this  
14 point?

15          MR. DIGOU: We have gathered -- I'm still waiting  
16 for one custodian. I believe that many of those e-mails  
17 have been gathered and reviewed.

18          THE COURT: They have been reviewed as well?

19          MR. DIGOU: That is correct.

20          THE COURT: I understand that there may be  
21 privileged and other issues and we can talk about timing.  
22 How long do you anticipate until you're ready to respond  
23 to the subpoena? The privilege log, that could be done?

24          MR. DIGOU: Well, your Honor, I think that, as the  
25 Court just indicated, that depends on the decision on the

1 objections on the merits before a response would need to  
2 be made, but, you know, perhaps ten days would be  
3 sufficient to produce, you know, assuming that a decision  
4 on the merits and the objections and things of that  
5 nature.

6 THE COURT: I'm not talking about the merits. I'm  
7 just trying to understand from a timing point of view.

8 MR. DIGOU: I think ten days would be sufficient.

9 THE COURT: Thank you. Please continue.

10 MR. LIEBERMAN: I would like to clarify some points.  
11 Mr. Wistow mentioned in his papers at least and we  
12 discussed briefly today about communications between me  
13 and him and Steve Sheehan. On December 21st it was  
14 suggested, I believe, in Mr. Wistow's papers that I  
15 didn't respond to Mr. Sheehan's protective order. On  
16 December 21st I wrote to Mr. Wistow and copied Mr.  
17 Sheehan. I said Max -- if I may read this part?

18 THE COURT: Please.

19 MR. LIEBERMAN: I will read part of it. I would  
20 like to ask your cooperation in agreeing to a protective  
21 order will provide the confidentiality and preservation  
22 of privilege of produced documents. As I mentioned to  
23 you and told the Court today, we are prepared to produce  
24 very shortly all corporate records and all records to  
25 which St. Joseph's has access. We ask only to have

1 agreement to such a protective order so we can go forward  
2 and produce the documents."

3 And then Mr. Wistow is absolutely correct. Mr.  
4 Sheehan then wrote to me on the 22nd and he provided a  
5 proposed protective order and I did get back to him that  
6 very same day. I try to get back to communications as  
7 quickly as I can. And I wrote to Mr. Sheehan copying Mr.  
8 Wistow on the 22nd. "Steve, Our proposal is intended to  
9 get you the corporate documents reasonably quickly. As  
10 to St. Joseph's own records, corporate records, we will  
11 give you a hard drive. We will not review before giving  
12 to you. See below as to protective order." And I go on  
13 to say, "As to the protective order, which would apply to  
14 all produced documents, but would have a provision  
15 dealing with the St. Joseph's corporate records, since we  
16 would not have reviewed any before producing these  
17 provisions state that the produced non-reviewed corporate  
18 records. The production has not waived St. Joseph's  
19 right to designate documents as confidential and/or  
20 privileged. That right could be exercised after  
21 production and the designation made about 25 days after  
22 production." So I did respond immediately and explained  
23 why.

24 THE COURT: Actually, when I read your objection  
25 until I got your reply, I said, boy, he sent out a



1 protective order and he didn't even respond. You didn't  
2 mention that.

3 MR. LIEBERMAN: I didn't mention that but I did  
4 respond.

5 THE COURT: I understand that. I read your  
6 objection. I said, boy, we have a problem here. You  
7 sent him a protective order and he never responded to  
8 you. You didn't tell me that.

9 MR. LIEBERMAN: I tend not to fill my papers that I  
10 submit to the Court with all my communications, but I did  
11 respond.

12 THE COURT: I will keep that in mind in future  
13 filings.

14 MR. WISTOW: That is also in the reply.

15 THE COURT: That's when I found about it. Okay.  
16 Continue.

17 MR. LIEBERMAN: As to the merits of the second  
18 subpoena, your Honor, that subpoena delves into work  
19 product, attorney client privilege. He wants to know how  
20 we will defend the case, what advice I'm giving or  
21 counsel has given to the client as to what to do in  
22 response to the subpoena. Your Honor, it not only deals  
23 with work product and attorney client privilege, but it  
24 deals with common interest. The Steward case, despite  
25 Mr. Wistow trying to push it aside, and I can understand

1 why he wants to hide from it, but it deals and controls  
2 this case. It deals with a very similar transaction,  
3 very similar defense with a production of documents, two  
4 opinions from the United States District Court of Rhode  
5 Island refusing and upholding the objection based upon  
6 the common-interest doctrine.

7 Not only that, Mr. Wistow told the Court, and  
8 willfully so, that he's doing an investigation to  
9 determine who he may possibly sue to recover funds, and  
10 he even told the Court that Prospect as successor to St.  
11 Joseph's might be liable for the misdeeds of St.  
12 Joseph's. So the common interest is absolutely clear and  
13 certain.

14 THE COURT: I saw in your papers that you won't give  
15 them to him, but you said you would bring them to court  
16 for an in-camera review. It's the 2013 agreement, I  
17 believe?

18 MR. LIEBERMAN: It's effective as of 2013. With the  
19 Court's permission, I will hand it up.

20 THE COURT: Hand it to the clerk.

21 THE COURT: You have would to agree that the  
22 common-interest privilege has to work its way up  
23 basically to a --

24 MR. LIEBERMAN: Because it's confidential, but when  
25 you read it, you'll see that I believe your Honor will

1 conclude that it refers to transactions and events that  
2 might flow from the transaction. I don't want to in  
3 public.

4 THE COURT: I'm not saying that. What I'm saying is  
5 that the common interest alone is not what you're saying.  
6 What you're saying is because of the common interest it  
7 falls under one of the privileges?

8 MR. LIEBERMAN: Yes. Absolutely. I'm saying, of  
9 course, in communicating with someone we didn't lose the  
10 attorney client privilege or the work product doctrine  
11 and that's one of the reasons. I don't want to belabor  
12 and burden the Court, Your Honor. I won't discuss  
13 sanctions, although as we explained in our papers, we  
14 don't believe they are justified. I appreciate the  
15 Court's time and courtesy. Thank you, your Honor.

16 THE COURT: Thank you very much.

17 MR. WISTOW: May I be very brief, your Honor?

18 THE COURT: Yes, you may.

19 MR. WISTOW: My failure to "meet and confer" I  
20 believe is satisfied by the multitude of correspondence  
21 back and forth trying to work this thing out. Now, this  
22 business about they have the records from the hospital.  
23 They had it physically. They're entitled under the  
24 contract. Then they said we subpoenaed Prospect and that  
25 everything was off at that point. The simple solution

1 from Prospect was to simply say make two sets, make two  
2 sets and we'll respond. Why would that delay anything?  
3 And, by the way, how did this communication back and  
4 forth take place. Did Prospect call somebody up? Who  
5 called who, by the way? All they have is these vague  
6 things, Prospect, St. Joseph's. There are human beings  
7 involved here and communications. The second subpoena  
8 was intended to ferret out did somebody at Prospect  
9 really say give me these things back and when. I think  
10 this is all relevant, your Honor.

11 By the way, I don't think I've ever heard as  
12 enormous a quiver as I heard this morning that our  
13 subpoena they didn't produce communications because we  
14 asked for things relating to communications. So much if  
15 there was an e-mail, that was a communication and they  
16 are not going to produce it. They are only going to  
17 produce stuff that talks about the e-mail. I submit,  
18 your Honor, that no lawyer, no matter how much he wants  
19 to thread a needle or would ever argue that a request or  
20 anything relating to communications doesn't include the  
21 communications.

22 And we also asked, we only picked one thing, we also  
23 asked anything that reflects the efforts that were made,  
24 which would be the so-called e-mails if they exist. I do  
25 submit, your Honor, I'm not interested in his theory of

1 the case and how he wants to defend it. I'm saying, and  
2 I hope your Honor can see, there is not a grounds for  
3 being imminently satisfied with their compliance with  
4 the first subpoena. When they tell me we're trying,  
5 we're trying. We're doing this and doing that. Show me.  
6 Show me what you did. Why are we so late and we still  
7 have nothing? Thank you, your Honor.

8 THE COURT: Before the Court is the motion to compel  
9 by the Special Investigator retained by the Receiver, who  
10 was appointed by this Court. St. Joseph's filed  
11 objections to the subpoenas themselves and under the  
12 rules the Special Investigator filed motions to compel  
13 both on subpoena one and subpoena two. I think it's  
14 important to start with why we're here in the first  
15 place. We are here because St. Joseph's Health Services  
16 of Rhode Island, Inc., came to this Court under its  
17 powers of equity and asked the Court to take not the  
18 whole corporation into a receivership proceeding, but  
19 asked the Court to take the retirement, the plan, into a  
20 receivership proceeding as far as, in their words, a wind  
21 down of the plan itself.

22 So without getting into the issues today in terms of  
23 based on that pattern of the corporation taking an asset  
24 of its own and placing it into receivership, whether  
25 issues such as privilege or confidentiality even apply

1 with respect to the Receiver, the Court will address  
2 what's before it. And what's before it is, from what I  
3 read and what I have seen, quite disturbing.

4 First, I want to address the issue raised by St.  
5 Joseph's just in the objection to the first and the  
6 second subpoena that the Special Investigator when he  
7 issued his subpoenas did not have the ability to issue a  
8 subpoena unless it was under a subsection of Rule 45 that  
9 St. Joseph's because they were the ones who put this  
10 entity into receivership are a party and, therefore, the  
11 rules with respect to the production of documents apply.

12 First, with respect to subpoena one, that has not  
13 been raised prior to the objection. St. Joseph's Health  
14 Care, Inc., responded to on three occasions the subpoena.  
15 There is ample correspondence back and forth about  
16 complying with the subpoena, gathering documents, and  
17 making copies. Once there was an issue in terms of the  
18 speed in which documents were being produced and how they  
19 were going to be produced, low and behold St. Joseph's  
20 raises a theory that we need to start from the beginning  
21 because it wasn't done under the proper rule.

22 So, first of all, this Court finds that even if it  
23 was an issue, St. Joseph's with respect to the first  
24 subpoena has waived that argument through it's partial  
25 compliance. Number two, and more importantly, this Court

1 issued an order giving the Receiver and the Special  
2 Investigator very broad power to subpoena documents to  
3 aid in its investigation in this matter. Certainly, St.  
4 Joseph's Health Services of Rhode Island, Inc., probably  
5 more than anyone else, because they put in to  
6 receivership, understands that it is the duty of the  
7 Receiver to investigate claims that they're making  
8 against third parties to bring additional assets into the  
9 estate. Based upon the filing by the petitioner in this  
10 case, St. Joseph's, they have suggested to the Court that  
11 it may be appropriate for the Court to make a decision in  
12 terms of a reduction of benefits.

13 Based upon that, this Court made a decision and gave  
14 expanded subpoena power to the Receiver and the Special  
15 Investigator. It was meant as an expedited discovery  
16 device to allow very quickly for information to come in.  
17 The Court has the authority to do this. The Court  
18 rejects any argument that this was not intended to apply  
19 to the petitioner, St. Joseph's, who asked the Court for  
20 its own equitable jurisdiction to put this plan into  
21 receivership. In fact, in this Court's opinion, St.  
22 Joseph's should have been the first one that along with  
23 the petition would have handed over thumb drives or  
24 documents to the Receiver about St. Joseph's, anything  
25 that had anything to do with the retirement plan, no

1 matter how far back it goes that they had in their  
2 possession, their custody, or their control.

3 So what do we have at this point? Because now it's  
4 not 14 days in the original subpoena, it's not a month,  
5 it's not two months. We are getting very close to three  
6 months at this point, or, actually, about 80 days since  
7 the subpoena has been served. And what the Court has  
8 been told today is that there are a certain number of  
9 documents that were reviewed for privilege that were  
10 produced in production on November 8th, November 9th, and  
11 I believe it was December 12th. The only substantive  
12 number in terms of production was on the 8th of November.  
13 I think we had 19 pages on each of the other days. So  
14 the Court asked the question and the Court did not get a  
15 real understanding or a good response which is what have  
16 you been doing for 50 some odd days. You have the 37 or  
17 so boxes of documents, According to Attorney Land's  
18 letters that are exhibits, they were sent over for  
19 scanning. Many of them, except for ten boxes, have been  
20 scanned at this point and absolutely no effort has been  
21 made to review those documents for privilege,  
22 confidentiality, and determination in terms of which of  
23 the 61 categories they are responsive to. As far as the  
24 electronic records, about 7,000 pages, some review has  
25 occurred. There is about 1,400 pages that have not



1 occurred and the petitioner is in the process of going  
2 through those records.

3 Let's put aside the Prospect records for a second.  
4 The Court, through looking at the correspondence in this  
5 case and the arguments by counsel, is that counsel for  
6 the petitioner was counting on the fact that this Court  
7 would require a protective order be entered that would  
8 allow them to hand over 44,000 pages of documents, both  
9 the corporate records as well as the electronic, to the  
10 Special Investigator and say, here you go. You figure  
11 out what is responsive. You go ahead and look at it even  
12 if it's privileged, even if it's attorney client  
13 privilege, but we have a right to come to you at some  
14 point in the future and say we claim a privilege. We're  
15 not talking about inadvertent disclosure here, which the  
16 rules cover. We're talking about a conscious decision  
17 not to make the review, not to put things into categories  
18 and especially from the petitioner would ask this Court's  
19 equitable jurisdiction. That is completely unacceptable.

20 As I heard yesterday during the snow, as I watched  
21 television in Foxborough, there is the old quote, "Do  
22 your job," and do your job is you have a subpoena, you  
23 have the petitioner who put these people into  
24 receivership, go through the documents, identify what is  
25 responsive, identify what you're going to assert

1 privilege on, be that attorney client, be that work  
2 product or other, produce the documents to the Special  
3 Investigator, produce a privilege log to the Special  
4 Investigator, and produce to this Court a privilege log  
5 with a binder of the documents that are not attorney  
6 client privileged that relate to other privileges so the  
7 Court can review them and make a decision if asked to by  
8 the Special Investigator. Do your job.

9 The Attorney General is sending me a weekly status  
10 report, is doing what they need to do. Prospect has  
11 reviewed 17,000 pages of documents and after that came to  
12 the Court with a request for confidentiality of 300 and  
13 some of. They have done it. The Diocese, after a motion  
14 practice has come to an agreement with the Special  
15 Investigator is giving weekly status reports and has gone  
16 through tens of thousands of pages of documents. You've  
17 got to understand my frustration. The only one who  
18 hasn't done so is the petitioner. You are going to do it  
19 and you have two weeks.

20 With respect to the other documents, which is the  
21 Prospect records, if St. Joseph's as the petitioner  
22 believes because they were granted access and they were  
23 taken back by Prospect, they still have these documents  
24 under their control under the asset purchase agreement.  
25 If Prospect will not provide you with a copy of the

1 documents within a very short period of time - I am going  
2 to ask for an update one week from today - St. Joseph's,  
3 the petitioner, shall bring a motion before this Court on  
4 an emergency basis with notice to Prospect and this Court  
5 after hearing may be inclined to compel Prospect to turn  
6 over full copies of the documents if they have them.

7 Now, you can work with the Special Investigator when  
8 you get them, how the certification is working, and how  
9 they are going to be produced, but it just doesn't end  
10 with they have all the documents and they said we want  
11 them back. That is not an answer.

12 There were a lot of things in the papers in terms of  
13 the objection. "There wasn't enough time." Well, I  
14 understand that after 14 days. I don't understand that  
15 after almost 80 days. "The subpoena was overbroad in  
16 some areas." I read the documents that the Special  
17 Investigator produced. There has been some discussion in  
18 terms of scope, but I also understand that the Receiver  
19 and the Special Investigator are tasked with finding out  
20 what happened to this plan and what potential claims can  
21 be brought against third parties. And it is relevant and  
22 appropriate in this case that if St. Joseph's Health  
23 Services of Rhode Island, Inc., has records, even if they  
24 go back to the 1960s, that those be produced to the  
25 Special Investigator. "St. Joseph's, the petitioner,

1 does not have employees and, therefore, they were not  
2 able to get the documents together and do a production in  
3 the past 80 days." As we talked about before, this is  
4 about marshaling documents, reviewing them, and producing  
5 them by category. It is true that for almost three and a  
6 half years St. Joseph's, at least the papers that are  
7 before the Court, even in the papers filed by St.  
8 Joseph's with the petition have known that this was an  
9 orphaned plan with no funds coming in after a \$14 million  
10 contribution and that there was absolutely no way that it  
11 was going to meet its obligations to the plan  
12 participants under the new plan.

13 So I understand that there are no employees of St.  
14 Joseph's, but there is an agent that is documented in the  
15 agreement, Attorney Land, there is at least a board  
16 member who is authorized to take action. Between the two  
17 firms representing St. Joseph's at this point there is a  
18 total of approximately 17 attorneys, not including  
19 support staff. And like I mentioned before, what is  
20 commonly in these cases because of costs and expense is  
21 to hire document review attorneys to go through the  
22 documents to assist in large-scale production. In fact,  
23 there is another case before this Court now dealing with  
24 well over a hundred thousand documents that deal with  
25 some of the same firms I have before me today and it was

1 done in a much shorter period of time than the 80 days  
2 that have gone past so far.

3 So as a result the Court grants the motion to compel  
4 by the Special Master. The Court reserves on the  
5 application for sanctions. And if the Special  
6 Investigator does want to put that on before the Court,  
7 the Court will hear argument from the parties. And,  
8 also, it may very well be necessary under the guidance  
9 from our Supreme Court to have an evidentiary hearing to  
10 make a determination. Right now we have a lot of  
11 allegations and some documents and certainly we will go  
12 to the next step. I hesitate to do so because based on  
13 the Cy Pres and some of the other issues, some of the  
14 assets, if not, more may eventually be making it to the  
15 pensioners as part of the plan. I don't know. But the  
16 last thing I want to do is go through a process where the  
17 Court issues sanctions and it's coming out of the pocket  
18 of the pensioners. What that leaves the Court to do is  
19 to possibly assess sanctions that are extremely serious  
20 in terms of which party. So the Court is going to hold  
21 off.

22 With respect to the second subpoena, and when I read  
23 that, this is my words, not Attorney Wistow or Attorney  
24 Lieberman, this is about frustration in terms of  
25 compliance, this is what are you doing, let's move the

1 football. And the Court wants St. Joseph's, the  
2 petitioner, to spend all their time and effort at this  
3 point over the next two weeks in completing the  
4 production. What this Court is going to do is schedule a  
5 conference for 15 -- actually, it will be a Friday, so  
6 that following Monday, to hear from both sides and then  
7 we will have an on-the-record conference whether  
8 compliance has been completed with the first subpoena,  
9 whether there are any issues and the Court will also  
10 address at that point the motion to compel with respect  
11 to the subpoena. So the Court is reserving on the second  
12 subpoena motion to compel and it is not issuing a  
13 decision at this point and that is specifically so we can  
14 get compliance with the first subpoena.

15 In terms of advising the Court, the Court over the  
16 next two weeks, so we're talking about four or so  
17 updates, and this can be by e-mail, every 72 hours this  
18 Courts want an e-mail from the parties advising in terms  
19 of where we are on the document review and production.  
20 The Court is available to the parties at any point during  
21 the next two weeks should there be issues that either  
22 party needs more clarification.

23 Attorney Lieberman, I am fully aware that you have  
24 only been in this case for two weeks. I am also fully  
25 aware of your reputation in cases you've handled with the

1 firm you've been with. I am fully confident that you  
2 will be able to pull the resources together to get this  
3 done so we can move this case on to the next stage. I am  
4 going to ask Attorney Wistow today to prepare an order to  
5 enter. I am going to ask him to e-mail it to the  
6 co-counsel or the petitioner and the Court is prepared to  
7 enter the order as early as the end of today. If counsel  
8 for the petitioner does not agree with the language of  
9 the order, counsel should also submit to the Court a  
10 competing order. This way if not tonight certainly over  
11 the weekend the Court can determine the appropriate order  
12 to enter in this case. Thank you very much.

13 MR. LIEBERMAN: If you would just clarify for me  
14 what day is the conference date? I apologize.

15 THE COURT: No problem. Madam Clerk, we are the 5th  
16 today?

17 THE CLERK: Yes, Judge.

18 THE COURT: So the Monday after the 19th.

19 THE CLERK: January 22nd.

20 THE COURT: January 22nd at 9:30 a.m.

21 MR. LIEBERMAN: Thank you very much, your Honor.

22 MR. WISTOW: At the risk of overreaching, I  
23 understand about the privilege log. We will take the  
24 position that it's too late to claim a privilege.

25 THE COURT: I absolutely understand. Let me deal

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with that issue afterwards.

( R E C E S S )