STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
v.	:	**C.A. No. PC-2017-3856**
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended	:	

DECISION

STERN, J. Prospect Medical Holdings, Inc. (Prospect Medical), Prospect East Holdings, Inc. (Prospect East), and Prospect Chartercare, LLC (PCC) (collectively Prospect Entities or Prospect) move this Court for relief from an injunctive order (the Stay), enjoining actions against St. Joseph Health Services of Rhode Island Retirement Plan's (the Plan) assets and property.[1]

The requested relief would enable Prospect to sue Chartercare Community Board (CCCB) in Delaware for claims detailed in a proposed complaint (Proposed Lawsuit),[2] which

[1] The Stay provides in full: "That the commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, **or any other proceeding, in law, or in equity or under any statute, or otherwise, against the Respondent or any of its assets or property,** in any Court, agency, tribunal, or elsewhere, or before any arbitrator, or otherwise by any creditor, corporation, partnership or any other entity or person, or the levy of any attachment, execution or other process upon or against any asset or property of the Respondent, or the taking or attempting to take into possession any asset or property in the possession of the Respondent or of which the Respondent has the right to possession, or the cancellation at any time during the Receivership proceeding herein of any insurance policy, lease or other contract with the Respondent, by any of such parties as aforesaid, other than the Receiver designated as aforesaid, without obtaining prior approval thereof from this Honorable Court, in which connection said Receiver shall be entitled to prior notice and an opportunity to be heard, **are hereby restrained and enjoined until further Order of this Court**." Order Appointing Permanent Receiver ¶ 15 (emphasis added).

[2] Only Prospect East and Prospect Medical are named as plaintiffs in the Proposed Lawsuit.

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alleges liability arising under PCC's limited liability company agreement (LLC Agreement).[3] Prospect East and CCCB are PCC's sole members. Stephen Del Sesto, Permanent Receiver (Receiver) for the Plan, has objected. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I

Facts

This instant motion arises in connection with a settlement agreement (Settlement Agreement) entered between the Receiver and various hospital entities—CCCB, St. Joseph Health Services of Rhode Island (SJHSRI), and Roger Williams Hospital—against whom the Receiver has filed claims on behalf of Plan participants (hereinafter Federal Court Action).[4] The Receiver brought the Federal Court Action in connection with his authority to "prosecute, defend, adjust, and compromise all claims and suits . . . on behalf of [the Plan] . . . ." One of the Settlement Agreement's terms over which there is much controversy provides that CCCB will hold its "Hospital Interests"[5] in trust for the Receiver. Prospect has continuously and strenuously objected to the term, contending it effects a transfer prohibited under PCC's LLC Agreement.

On September 4, 2018, the Receiver filed a petition for instructions requesting this Court authorize the Receiver to proceed with the Settlement Agreement as in the best interest of the Plan. This Court issued a Decision on October 29, 2018, approving the Settlement Agreement.

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[3] PCC also requests relief to file administrative petitions with relevant regulatory agencies. However, PCC requested, in the alternative, that the Court instruct the Receiver to file such petitions. The Court will instruct the Receiver, prior to the effectuation of the settlement agreement, if necessary, to seek regulatory approval. Therefore, the Court confines its analysis to Prospect's proposed suit against CCCB.

[4] The Receiver filed a parallel action in the Rhode Island Superior Court (C.A. No. PC-2018-4386), which has been stayed pending further order from this Court.

[5] The Hospital Interest "means all of the claims, rights and interests against or in [PCC] that CCCB received in connection with [PCC's] LLC Agreement or subsequently obtained, including but not limited to the 15% membership interest in [PCC], and any rights or interests that SJHSRI or RWH may have in connection therewith."

However, in doing so the Court imposed two conditions: federal court approval and appropriate notice to objecting parties to enable them to contest the Settlement Agreement's substantive terms. The Court expressly acknowledged Prospect would have an opportunity to challenge whether CCCB's assignment of the Hospital Interests violated the LLC Agreement.

On March 3, 2019, while the instant motion was pending but before oral argument, CCCB filed a lawsuit naming, among others, the Prospect Entities (CCCB Lawsuit). The CCCB Lawsuit requests, *inter alia*, the entry of a declaratory judgment finding the Settlement Agreement does not violate the LLC Agreement, and that PCC is obligated to furnish certain information relating to long-term capital commitments. Prospect's present petition asks the Court for permission to pursue claims against CCCB in Delaware.

II

Standard of Review

A receivership court has discretion to permit or deny an independent action from being filed against a receivership's assets or property outside the receivership process. *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1996 (10th Cir. 2010); *U.S. v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 442-43 (3rd Cir. 2005); *S.E.C. v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984). Our Supreme Court has yet to set forth a specific framework for analyzing such petitions for relief from stay; therefore, the Court will look to the Bankruptcy Code for guidance. *See Reynolds v. E & C Assocs.*, 693 A.2d 278, 281 (R.I. 1997).

The relevant analysis requires balancing the receiver's interest in administering the receivership estate and marshalling assets without distraction or interference against the interests of the party seeking relief from stay so litigation may proceed. *S.E.C. v. Univ. Fin.*, 760 F.2d 1034 (9th Cir. 1985); *United States v. ESIC Cap., Inc.*, 685 F. Supp. 483 (D. Md. 1988).

Because there are times when a litigant's right to proceed with litigation outweighs the receiver's interest in unhindered administration, relief from stay has been described as an "an appropriate escape valve, which allows potential litigants to petition the court for permission to sue . . . so that litigants are not denied a day in court during a lengthy stay." *Acorn Tech. Fund, L.P.*, 429 F.3d at 443.

In analyzing a motion for relief from stay, courts generally look to the three-factor test enunciated by the Ninth Circuit: (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim." *Wencke*, 742 F.2d at 1231; *see also Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 32 (1st Cir. 1994); *Estate Const. Co v. Miller & Smith Holding Co.*, 14 F.3d 213, 219 (4th Cir. 1994); *Nat'l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 658 (Bankr. S.D.N.Y.), aff'd 962 F.2d 1 (2d Cir. 1991).

III

Analysis

1

The Stay's Applicability

Before addressing the appropriateness of relief from the Stay, the Court must address the Stay's applicability. The Stay only applies to prevent the institution of actions against the Plan or its "assets or property." Prospect acknowledges that the Receiver holds a "contingent

interest" in CCCB.[6] Nevertheless, Prospect argues the Stay cannot preclude Prospect from vindicating rights arising under a contractual relationship with CCCB. This Court disagrees.

In the receivership and bankruptcy contexts, a stay prevents any action "the resolution of which may have a significant impact on the debtor." *See Maaco Enters., Inc. v. Corrao*, Civ. A. No. 91-3325, 1991 WL 255132, at *2 (E.D. Penn. Nov. 25, 1991); *see also In re 48th Street Steakhouse, Inc.*, 835 F.2d 427 (2d Cir. 1987). The analysis does not turn on technicalities, such as whether the debtor is named a party or whether the proceeding is merely declaratory in nature. *See In re Kaiser Aluminum Corp., Inc.*, 315 B.R. 655, 658 (D. Del. 2004) (*Kaiser*) (holding creditor's declaratory action against an insurance company—concerning the creditor's right to insurance proceeds in which the debtor claimed a right—violated the Bankruptcy Code's automatic stay). If an action taken against the non-bankrupt party would inevitably have an adverse impact on property of the bankrupt estate, then the action is barred by the automatic stay. *In re Metal Center, Inc.,* 31 B.R. 458, 462 (Bankr.D.Conn.1983) ("The debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate.").

Here, the Court finds the Proposed Lawsuit may significantly impact the Plan. The Lawsuit seeks a declaration that "all prior agreements granting any portion of or interest in CCCB's membership in [PCC] to [the Receiver] are null and void." The requested relief directly implicates the Plan's contingent interest in CCCB because if Prospect successfully argues CCCB is prohibited from transferring its membership interest, the Plan will be deprived a potentially significant monetary benefit. *Cf. In re Bialac,* 712 F.2d 426, 431–32 (9th Cir.1983) (automatic

[6] Moreover, the Court has already held the Receiver's right to the Hospital Interests is a cognizable assets and/or property of the Plan for purposes of the Stay and incorporates that determination herein. *See* Decision, November 14, 2018.

stay prohibited creditor from foreclosing on property in which debtor had right of redemption, even though property was owned by non-bankrupt individuals). Stated differently, the requested relief would effectively undermine a transaction allocating the value of CCCB to the Receiver, which would provide a significant benefit to the Plan.

Prospect's attempt to cast the Proposed Lawsuit as involving an "independent contractual right" is unavailing because Prospect's rights are necessarily intertwined with and connected to the Plan's contingent interest in CCCB. The value and validity of the Plan's interest in CCCB turns on determinations that would be made in the Proposed Lawsuit. Prospect cites a Superior Court case, *Dulgarian v. Sherman*, for the broad proposition that actions against parties who contract with an entity in receivership do not violate a receivership order enjoining actions against a receivership estate. C.A. No. 91-3468, 1992 WL 813512 (R.I. Super. Ct. Jan. 7, 1992). However, the *Dulgarian* Court dealt with a situation in which no harm could flow to the detriment of the debtor. The court held that a stay was inapplicable to a foreclosure action by a junior mortgagee because—although the receivership estate also held a mortgage on the subject property—the estate's mortgage had priority and therefore was not extinguished in connection with the sale. *Id.* at *2. Contrarily, in this case, the Plan's contingent rights in CCCB would be completely extinguished upon a determination the proposed transfer violates PCC's LLC Agreement. One could argue no harm will flow to the Plan if it were determined the Plan was not entitled to receive an assignment of the Hospital Interests in the first instance. However, the focus of the inquiry turns on potential *impact* to the Plan, as opposed to potential harm. A declaration voiding a term of the Settlement Agreement would significantly impact the Plan.[7] Therefore, the Proposed Lawsuit is enjoined by the Stay absent an order from this Court.

[7] In either case, as will be shown *infra*, relief from the Stay is appropriate.

While the Stay applies, the Court is mindful that it must balance all interests at stake, including Prospect's interest in ensuring enforcement of obligations and rights arising under the LLC Agreement. Hence, the Court must balance the *Wencke* factors to determine whether relief from the Stay is appropriate.

2

Balancing the *Wencke* Factors

A

Maintenance of the Status Quo Versus Injury to the Movant

The first *Wencke* factors requires a court to determine "whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed." 742 F.2d at 1231. This factor "essentially balances the interests in preserving the receivership estate with the interests of the movant." *S.E.C. v. Stanford Int'l Bank Ltd.,* 424 F. App'x 338, 341 (5th Cir. 2011); *S.E.C. v. Illarramendi,* 3:11CV78 JBA, 2012 WL 234016 (D.Conn. Jan. 25, 2012); *Schwartzman v. Rogue Int'l Talent Grp., Inc.,* CIV.A. 12–5255, 2013 WL 460218 (E.D. Pa. Feb. 7, 2013) (first factor requires court "to balance the Receiver's interest in maintaining the status quo with any injury the moving party may suffer if the stay remains in place"); *U.S. v. ESIC Capital, Inc.,* 675 F. Supp. 1462, 1463 (D. Md. 1987) (court must assess "the competing interests of the injury to the moving party versus preserving the status quo").

Turning first to status quo, the Court agrees with Prospect that the Receiver altered the status quo by entering into the Settlement Agreement containing provisions arguably violative of the LLC Agreement. *See United States v. JHW Greentree Capital, L.P.*, Civil Action No. 3:12-CV-00116 (VLB), 2014 WL 2608516 (D. Conn. June 11, 2014) (finding the Receiver disrupted

the status quo by establishing summary disposition proceedings and authorizing payments of claims). The Settlement Agreement stipulated that "[CCCB] agree[s] to hold the CCCB Hospital Interests in trust for the Receiver, and that the Receiver will have the full beneficial interests therein." Furthermore, in connection with the Settlement Agreement, CCCB both executed a security agreement giving the Receiver a security interest in all CCCB's tangible and intangible property and filed a UCC-1 with the Secretary of State.

The Receiver was aware of the probable multiplicity of litigation that would stem from proceeding with the Settlement Agreement because Prospect expressly forecast its legal concerns in response to the Receiver's petition for settlement instructions. In fact, the Receiver expressly acknowledged in open court on numerous occasions that Prospect's concerns would need to be litigated.[8] Any potential multiplicity of actions in different forums and increased litigation costs are calculated risks the Receiver assumed by agreeing to the subject provisions of the Settlement Agreement. *Cf. Univ. Fin.*, 760 F.2d at 1038 (considering the multiplicity of actions in

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[8] For example, the Court engaged Mr. Wistow, Special Counsel for the Receiver, in the following colloquy:

> THE COURT: -- And so at some point some judge is going to have to wrestle with the issues that Mr. Halperin has, I think, legitimately brought up. And this question of compliance with the Hospital Conversion Act and so forth is going to have to be examined. So you don't -- you're not going to be able to weave around it.
>
> MR. WISTOW: I'm not trying to. I'm willing to stipulate, your Honor, that all I'm asking for is an assignment of that claim. **And I will be forced, as Mr. Halperin acknowledges, to get involved in litigation.** This happens in bankruptcy very frequently in the settlement of cases. * * * That's all -- I'm willing to stipulate on the record that if your Honor approves the transfer of that claim, you are not saying at all that we are legitimately entitled . . . to have this, nor am I saying that the transfer to us was not a breach. All I'm saying is that the court allowed us to transfer.

conducting status quo analysis). Therefore, refusing to lift the Stay will not disturb the current status quo.

The prejudice to Prospect is comparably significant. Because of the Stay, Prospect has been limited in its ability to assert its purported rights under the LLC Agreement. Meanwhile CCCB—a member of PCC with a contractual relationship and certain obligations to Prospect—has continued to hold the Hospital Interests "in trust" for the benefit of the Receiver, Prospect's adversary in the Federal Court Action. Yet, the Stay has shunted Prospect from raising, litigating, and seeking affirmative relief concerning CCCB's present arrangement with the Receiver. Courts have turned a skeptical eye in instances where a Receiver takes affirmative acts implicating another's interests and attempts to hide behind the protection of a stay to avoid retaliation. *Cf. In re Overmyer*, 32 B.R. 597, 601 (Bankr. S.D.N.Y. 1983) (explaining "a court must be cautious to avoid a decision which would convert [a stay] from a shield into a weapon"); *see also Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1168 (2d Cir. 1979) ("Where a debtor institutes a lawsuit and then invokes the protection of [a stay] on a counterclaim, the situation warrants a very thoughtful scrutiny."). The Court is not intimating the Receiver acted malevolently by entering the Settlement Agreement or otherwise pursuing the Federal Court Action on the Plan's behalf. In fact, the Court found in connection with the Receiver's petition for settlement instructions that the Settlement Agreement was in the Plan's best interest.

Nevertheless, the Court has an equitable obligation to balance the interests of third parties where, as here, the Receiver "set the ball rolling" by initiating the Federal Court Action through the receivership process. In this case, the Receiver took the affirmative step of entering the Settlement Agreement, implicating Prospect's interests, and now seeks to control the time and forum of Prospect's Proposed Lawsuit opposing the Settlement Agreement: this dynamic

essentially turns the Stay into a sword despite the Receiver's protestations to the contrary. Stated simply, maintaining the Stay causes a prejudice to Prospect by enabling the Receiver to act against Prospect's interest while limiting Prospect's ability to respond. Therefore, the Court finds the first *Wencke* factor—status quo versus prejudice—favors lifting the Stay.

B

Timing

The next *Wencke* factor requires a court to analyze the time in a receivership in which a motion for relief is made. There is no "clear cut-off date after which a stay should be presumptively lifted." *Acorn Tech. Fund, L.P.*, 429 F.3d at 442-43. The timing factor is inherently fact-specific and involves a consideration of various factors, including the number of entities involved and the complexity of the case. *Stanford Int'l Bank Ltd.*, 424 F. App'x at 341. In discussing the timing element, the *Wencke* Court adopted a test akin to a sliding scale:

> [w]here the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim. As the receivership progresses, however, it may become less plausible for the receiver to contend that he needs more time to explore the affairs of the entities. The merits of the moving party's claim may then loom larger in the balance. 742 F.2d 1231-32.

As a general matter, courts are reluctant to lift litigation stays early in a receivership where to do so would disrupt the receiver's duty to organize and understand the assets. *S.E.C. v. Byers*, 592 F. Supp. 2d 532, 537 (S.D.N.Y. 2008), *aff'd*, 609 F.3d 87 (2d Cir. 2010) (in SEC receivership action, where receiver had "only just begun to investigate the full extent of the fraudulent scheme," timing factor weighed in favor of receiver as "permitting some investors to file involuntary bankruptcy petitions would hinder the Receiver's investigation"); *Illarramendi,* 2012 WL 234016 (timing factor weighed in favor of receiver where receivership was six months

old at time of movant's motion, receiver had just begun its voluminous investigation, and the bar date for claims against the receivership entities had just passed); *Stanford Int'l Bank Ltd.,* 424 F. App'x at 341–42 (affirming district court's conclusion that timing factor weighed in favor of receiver and its interest in marshaling and conserving the estate where receivership had been in place for one year, underlying Ponzi scheme was complex and intricate—involving many entities and billions of dollars—and satellite litigation instigated by receiver on behalf of estate was just beginning); *F.T.C. v. 3R Bancorp,* 04 C 7177, 2005 WL 497784 (N.D. Ill. Feb. 23, 2005) (timing factor favored receiver where receiver had "had little more than three months to begin to unravel the[ ] labyrinthine entanglements" involved in a far-reaching telemarketing scam).

Conversely, lifting a stay is more palatable later in a receivership's lifetime, after the receiver has had sufficient time to conduct its duties. *S.E.C. v. Provident Royalties, L.L.C.,* 3:09–CV–1238–L, 2011 WL 2678840 (N.D. Tex. July 7, 2011) (timing factor weighed heavily in favor of lifting stay where receivership was almost two years old, receiver had marshaled almost all receivership assets and had proposed a plan of distribution); *SEC v. Private Equity Mgmt. Grp.,* LLC, CV 09–2901 PSG EX, 2010 WL 4794701 (C.D. Cal. Nov. 18, 2010) (second factor cut against receiver where receivership was well over one year old and receiver had progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court).

Here, the Receiver has made substantial progress in terms of investigating and understanding the breadth of assets available to potentially address and satisfy the Plan's underfunded status. The Receiver's counsel has issued numerous subpoenas, instituted the Federal Court Action, moved to intervene in a *cy pres* proceeding attendant to the Receivership, and negotiated settlements with various defendants. The Receiver has clearly considered the

potential causes of the Plan's underfunded status, organized a litigation strategy to address the problems, and commenced litigation. The Proposed Lawsuit only arose in connection with certain controversial terms contained in a *settlement agreement* entered by the Receiver.

Moreover, the Receiver has had substantial time to operate under the shield of the Stay. The Plan was petitioned into Receivership in August of 2017, nearly two years ago. It is important to note that counsel for Prospect represented to the Court that in accordance with a stipulation of the parties—if the Court grants leave—the Delaware lawsuit will be filed and immediately stayed until at least December 20, 2019. This stipulation ensures the Receiver will incur minimal litigation costs in connection with the Delaware suit for at least another five months and gives the Receiver ample time to prepare a litigation strategy for motion practice in Delaware. Having established the Receiver has had sufficient time to substantially investigate the Plan's underfunded status and develop a strategy for resolution, the Court finds the timing aspect of the *Wencke* test favors lifting the Stay.

C

Colorable-Claim Analysis

The final prong of the *Wencke* test involves a consideration of "the merit of the moving party's underlying claim." 742 F.2d at 1231. "The more meritorious a movant's underlying claim, the more heavily this factor will weigh in the movant's favor." *United States v. JHW Greentree Capital, L.P.*, No. 3:12-CV-00116 (VLB), 2014 WL 12756827, at *7 (D. Conn. May 16, 2014). However, a motion for relief is not an adjudication of the underlying substantive claims, defenses, or counterclaims. *Grella*, 42 F.3d at 33. Like a motion for a preliminary injunction, a motion for relief is a "summary proceeding" to test whether the claim is "colorable" or "sufficiently plausible." *Id.* at 35l; *In re Spencer*, 531 B.R. 208, 212 (Bankr. Wisc. 2015) ("A

decision to modify the stay is only a determination that the creditor's claim is sufficiently plausible to allow its prosecution elsewhere.") (citation omitted); *In re Fontaine*, No. 10-98793, 2011 WL 1930620, at *2 (Bankr. Ga. Apr. 14, 2011).

Here, without ruling on the merits, the Court finds Prospect has presented at least colorable and sufficiently plausible claims. The Proposed Lawsuit involves three counts: declaratory judgment, breach of the LLC Agreement, and a request for injunctive relief. The counts rise and fall on whether the LLC Agreement allows CCCB to grant its membership interest in PCC to the Receiver. The Agreement provides the following:

> 13.1 Transfers by Member: Except as otherwise set forth in this Article XIII, a Member may not sell, assign (by operation of Law or otherwise), transfer, pledge, or hypothecate ("Transfer") all or any part of its interest in the Company (either directly or indirectly through the transfer of the power to control or to direct or cause the direction of the management and policies of; such Member).

Given CCCB, a member of PCC, agreed to transfer its membership interest to the Receiver in connection with the Settlement Agreement, Prospect argues the transfer is expressly prohibited by the language of Section 13.1.

However, the Receiver points to the "[e]xcept as otherwise set forth in this Article XII" phrase to argue the transfer is excluded from Article 13.1. Section 13.2(a)(ii) provides:

> (a) Notwithstanding the restriction in Section 13.1, the following Transfers are permitted and shall not be deemed to violate the restrictions contained in Section 13.1 * * *
> (ii) Transfers by a Member to one or more of its Affiliates, or a Transfer by CCHP to CharterCARE Health Partners Foundation (f/k/a St. Joseph Health Services Foundation), any such transferee automatically becoming a substitute Member.

The Receiver argues that as the estate's representative and in accordance with the LLC Agreement, he is an "Affiliate" of CCCB because it indirectly controls SJHSRI, which in turn

directly controls the Plan.[9] Whether the exception applies turns on CCCB's right to "control" the Plan, an inherently factual inquiry. *See, e.g., Pineda v. Chase Bank, USA, N.A.*, 186 A.3d 1054, 1057 (explaining that the determination of whether an agency relationship exists—which involves a determination of whether the principal will be in control of the undertaking—is an issue of fact); *Rivas v. Federacion de Associaciones Pecuarias de Puerto Rico,* 929 F.2d 814, 820 (1st Cir. 1991) (citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 480-81 (1964)) (recognizing as an issue of fact whether an entity possesses sufficient indicia of control over employees so as to constitute a joint employer); 57B Am. Jur. 2d *Negligence* § 1238 ("In determining the applicability of the doctrine of res ipsa loquitur, the question of the defendant's control of the instrumentality causing the injury is a question of fact.").

Herein is a classic situation of one party arguing a court should apply the general rule, and the opponent countering for an application of the exception. It is exclusively within the province of the court hearing the Proposed Lawsuit to determine, in the first instance, whether to apply the general rule or the exception. As explained, this Court's review of the arguments is limited to an assessment of plausibility under the *Wencke* test. *Grella*, 42 F.3d at 33. Because both Prospect and the Receiver have pointed to language supporting their respective positions interpreting the above-referenced provisions of the LLC Agreement, the Court finds the Proposed Lawsuit is "colorable" and "sufficiently plausible" for purposes of *Wencke*.

The Receiver additionally argues the Proposed Lawsuit is without merit because pursuant

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[9] The LLC Agreement defines the term "Affiliate" to mean "as to the Person in question, any Person that directly or indirectly controls, in controlled by, or is under common control with, the Person in question and successors or assigns of such Person; and the term "control" means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person whether through ownership of voting securities, by appointment of trustees, directors, and/or officers, by contract or otherwise. LLC Agreement, Article I, Section 1.4.

to this Court's rules of civil procedure, Prospect can sue CCCB only via a counterclaim in the CCCB Lawsuit. Super R. Civ. P. Rule 13(a). While this argument could potentially be persuasive at a later point in the CCCB Lawsuit, a majority of courts have held the bar to future suits triggered by Rule 13(a) only arises when a responsive pleading has been filed. *U.S. v. Snider,* 779 F.2d 1151, 1157 (6th Cir. 1985) (citing *Lawhorn v. Atlantic Refining Co.,* 299 F.2d 353, 356-357 (5th Cir. 1962), *Martino v. McDonald's System, Inc.,* 598 F.2d 1079 (7th Cir. 1979). *See also Mutual Fire, Marine & Inland Ins. Co. v. Adler,* 726 F. Supp. 478, 482-483 (S.D.N.Y. 1989) (applying this rule to claim preclusion, holding no claim preclusion against defendant in prior suit when that suit was dismissed prior to responsive pleading).

Though this Court is not aware of our Supreme Court having interpreted Rule 13(a) prior to the filing of a responsive pleading, the plain reading supports the majority view: "***[a] pleading*** shall state as a counterclaim any claim ***which at the time of serving the pleading*** the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." Pragmatically, this construction is sound: until Rule 12 motions are decided, it is impossible to know whether the plaintiff has a claim, meaning it is impossible to know whether there exists a valid underlying claim to counter. Because Prospect has not filed a responsive pleading in the CCCB Lawsuit, Rule 13(a) has not been triggered and does not affect the viability of the Proposed Lawsuit.[10]

In a related line of argumentation, the Receiver avers the "first-to-file" rule mandates that

[10] At oral argument, the Receiver also postulated the LLC Agreement's venue provision somehow mandates Rhode Island is the appropriate forum for Prospect's dispute against CCCB. In looking at the venue provision, the Court finds the parties agreed some claims would be litigated in Rhode Island and some in Delaware. However, the Court finds the venue provision is ambiguous as to its scope and effect, including whether the clause designating a Rhode Island venue is limited to injunctive relief; therefore, this Court declines to render its interpretation and resolve the ambiguity during this summary proceeding.

venue is proper only in Rhode Island. The rule provides "when two actions involve the same parties and issues, the Court hearing the earlier filed action ***may*** enjoin proceedings in the second action." *Rohm & Haas Co. v. Brotech Corp.*, 770 F. Supp. 928, 935 (D. Del. 1991) (emphasis added); *see also City of New York v. Exxon Corp.*, 932 F.2d 1020, 1021 (2nd Cir. 1991) (internal citation omitted) ("[W]here an action is brought in one federal district court and a later action embracing the same issue is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action . . . unless there are special circumstances which justify giving priority to the second action."). Far from a rigid rule, the first-to-file rule is a discretionary one that requires considerations of "wise judicial administration" and judicial efficiency. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952). Whether the first-to-file rule should apply under the circumstances is a question of equity to be addressed by the Court hearing the CCCB Lawsuit and does not affect the merits of the Proposed Lawsuit as a matter of law. Accordingly, the Proposed Lawsuit sets forth colorable claims for relief, tipping the final *Wencke* factor in support of granting relief from the Stay.

IV

Conclusion

For the foregoing reasons, the Court finds the Stay applies; however, relief from the Stay is appropriate with respect to the Proposed Lawsuit. The Court has been candid from the outset that Prospect's opposition to the Settlement Agreement's substantive terms would need to be litigated and resolved. Thus, because the *Wencke* factors tip in favor of lifting the Stay, the Court grants Prospect's motion. Counsel for Prospect shall prepare and submit the appropriate order for entry. This Court will reserve with respect to Prospect's request for relief from the Stay to file an administrative proceeding with the relevant regulatory agencies.