

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

ST. JOSEPH HEALTH)
SERVICES OF RHODE ISLAND,)
INC.)

VS.)

PC-2017-3856

ST. JOSEPH HEALTH)
SERVICES OF RHODE ISLAND)
RETIREMENT PLAN, AS)
AMENDED, BANK OF AMERICA,)
TRUSTEE)

HEARD BEFORE

THE HONORABLE BRIAN P. STERN

ON MAY 2, 2019

MOTION

LINDA M. CORDEIRO
OFFICIAL COURT REPORTER

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE.....RECEIVER

MAX WISTOW, ESQUIRE.....FOR THE RECEIVER

STEPHEN SHEEHAN, ESQUIRE.....FOR THE RECEIVER

PRESTON W. HALPERIN, ESQUIRE....FOR PROSPECT MEDICAL

CHRISTOPHER FRAGOMENI, ESQUIRE..FOR PROSPECT MEDICAL

W. MARK RUSSO, ESQUIRE.....FOR PROSPECT CHARTERCARE

ALSO PRESENT:

RICHARD J. LAND, ESQUIRE.....ST. JOSEPH'S HEALTH

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

I, **LINDA M. CORDEIRO**, hereby certify that the succeeding pages **1** through **67**, inclusive, are a true and accurate transcript of my stenographic notes.

Linda M. Cordeiro

LINDA M. CORDEIRO
Official Court Reporter

1 Thursday, May 2, 2019

2 MORNING SESSION

3 (The proceedings commenced at 10:35 a.m.)

4 THE COURT: Madam Clerk, will you call the case,
5 please?

6 THE CLERK: Your Honor, the matter before the Court
7 is case number, PC-2017-3856, St. Joseph's Health
8 Services of Rhode Island versus St. Joseph's Health
9 Services of Rhode Island Retirement Plan.

10 This matter is down for the Prospect Entities'
11 notice of intent to sue or in the alternative motion for
12 relief.

13 Will counsel please identify themselves for the
14 record?

15 MR. DEL SESTO: Good morning, your Honor. Stephen
16 Del Sesto, the receiver for the plaintiff.

17 MR. WISTOW: Max Wistow, for the receiver.

18 MR. SHEEHAN: Stephen Sheehan, for the receiver.

19 MR. HALPERIN: Preston Halperin, Prospect Medical
20 Holdings.

21 MR. FRAGOMENI: Chris Fragomeni, on behalf of
22 Prospect Medical.

23 MR. RUSSO: Mark Russo, for Prospect CharterCare,
24 LLC.

25 THE COURT: After several continuances at the

1 parties' request, and the last one where the Court had
2 continued the case, the Court has this motion before it
3 today.

4 I know the issues have changed slightly. The Court
5 has reviewed all the papers, including the moving papers,
6 the objection, the reply, also the sur-reply, all the
7 exhibits, as well as the cases that were cited by both of
8 the sides. So the Court is prepared to hear oral
9 argument on the motion today, and the Court also has some
10 questions. So why don't we move forward, counsel?

11 MR. HALPERIN: Good morning, your Honor. Your
12 Honor, as the Court is aware, before the Court today is a
13 motion filed by the Prospect Entities, which is styled as
14 a notice of intent to sue CharterCare Community Board,
15 or, in the alternative, a motion for relief from the
16 injunctive provisions from the stay that was entered in
17 connection with the permanent receivership order.

18 Our first argument, your Honor, is that the stay
19 should not apply to the lawsuit that the Prospect
20 Entities, some of them, wish to pursue against CCCB. And
21 the reason we don't think the stay should apply, your
22 Honor, is because this is a lawsuit that is strictly
23 based on an existing contractual relationship between
24 CCCB and the Prospect Entities. While the receiver may
25 have a derivative interest, it may have an official

1 interest, it may even ultimately become the owner of
2 whatever it is that CCCB has, we don't see how that
3 should in any way abrogate the contractual rights that
4 the Prospect Entities have to protect themselves and to
5 pursue their contract.

6 The Court made a determination previously that the
7 interest that the receiver held was property of the
8 estate, and we certainly have no intention to challenge
9 that in any way, but I do think there is something to
10 distinguish here. That was based upon a direct assault,
11 as the Court I think viewed it, in attempting to pursue
12 an administrative proceeding that would essentially
13 directly affect, perhaps nullify, the settlement
14 agreement, and the Court made it quite clear that it was
15 necessary to seek leave to take that sort of a tack.

16 This, however, is based on the contract, and we
17 cited the *Dulgarian* case, which is not completely on
18 point in the sense that the Court in that case made a
19 determination that there was not going to be any
20 potential harm to the estate. However, what is the same
21 is that it's based upon an independent contractual right.
22 In that case it was a mortgage holder. In this case it's
23 contract rights under the LLC agreement and under the
24 asset purchase agreement.

25 There are many situations where a receiver might

1 have an interest in an asset or even in a third-party.
2 It might be a company that it holds stock in, it might be
3 a member. Creditors are not barred from pursuing their
4 ordinary course claims. This is a contract claim. Yes,
5 the contract relates to conduct taken by CCCB in
6 connection with this receivership; however, it's still
7 the right of Prospect to raise the issue as to whether or
8 not that transfer that's being proposed violates the LLC
9 agreement, and completely independent of any of this is
10 the indemnification right. And I think it's important to
11 look at that separately.

12 There is a contractual obligation on the part of
13 CCCB to indemnify the Prospect Entities from any claims
14 that arise related to this pension plan. That contract
15 claim needs to be pursued.

16 Now, my brother argues that we should pursue it in a
17 different venue. That's not for them to say, and I don't
18 even think that's before the Court today as to where is
19 the appropriate venue. But that claim needs to be
20 brought, and there is some real prejudice associated with
21 not being able to bring that claim now. I'll get to that
22 when I get to the elements of lifting the stay.

23 THE COURT: Just a question. In your reply as an
24 attachment was the proposed Delaware Chancery Complaint.
25 Was indemnification included in that complaint?

1 MR. HALPERIN: I believe it was, and I believe
2 that's also why Prospect Medical is in that case.

3 THE COURT: Please continue.

4 MR. HALPERIN: The issue before the Court, your
5 Honor, we believe is a much narrower issue than that
6 which has been briefed for the Court.

7 The issue before the Court is, Under what
8 circumstances should the Court relieve a party from the
9 injunctive or the stay provisions that govern this
10 receivership at its outset. And we believe that the law
11 as it relates to that is fairly established, not
12 necessarily as much as we might like it to be in Rhode
13 Island, but, necessarily, it is established if you look
14 at other jurisdictions and stays.

15 We've cited *SEC v. Wencke*, which I imagine the Court
16 is familiar with, and this is a very widely-adopted
17 standard. Virtually every circuit court of appeals has
18 adopted this, and, we believe, looking at these three
19 elements, it's at least very instructive, if not
20 dispositive.

21 Under the *Wencke* standard the Court looks at three
22 things. The first one is whether or not lifting the stay
23 genuinely preserves -- excuse me -- refusing to lift the
24 stay, does that genuinely preserve the status quo, or
25 will the moving party suffer substantial injury if not

1 permitted to proceed? The second one is, What's the
2 timing of asking for the stay to be lifted in the context
3 of the receivership? And the third is, Has the party
4 seeking to lift the stay shown that they have a colorable
5 claim?

6 As to the first standard, status quo is an
7 interesting one in this case because the status quo has
8 changed dramatically over the almost two years that this
9 receivership has been ongoing. And the status quo as it
10 relates to why we're here today is that the receiver has
11 had a significant amount of time to become familiar with
12 this estate. The receiver has engaged special counsel,
13 who has spent an enormous amount of time and resources
14 doing thorough investigations, screening documents, and
15 ultimately filed two lawsuits in the state court, and
16 ultimately participated -- I'm not going to get into what
17 way, shape, or form, but participated in some way in the
18 filing of this CCCB case.

19 So the status quo is that the Prospect Entities have
20 been on the receiving end of subpoenas and three
21 lawsuits. That's the status quo. During this period of
22 status quo activity, the Prospect Entities have
23 essentially been prevented from taking any action, other
24 than having defended the federal court case and filing
25 the motion to dismiss. That's the extent of what the

1 Prospect Entities have done while being sued in three
2 different courts.

3 That first standard of status quo is important
4 because it is not the status quo of holding things in
5 abeyance so that the receiver can get his arms around the
6 case, which is what the purpose of the stay is about.
7 Aside from the status quo, the second part of that first
8 standard is, Is there prejudice? And we would submit to
9 the Court that there is actual prejudice going to as a
10 result of the delay in allowing Prospect to assert its
11 contractual rights.

12 The most obvious factor, the easiest to explain, is
13 with respect to the indemnification. CCCB has an
14 obligation to indemnify for issues arising out of the
15 pension plan. Prospect is suffering damages on a daily
16 basis in defending these claims. All of its legal
17 expense would be subject to indemnification claim. That
18 claim could be asserted and should be asserted against
19 CCCB.

20 If during this period of injunction the settlement
21 goes forward, all the assets are transferred, there is no
22 value left in that indemnification claim, that is about
23 as severe a prejudice as one could suffer as a result of
24 the injunctive stay.

25 The second prong of **Wencke** is timing. As I said a

1 minute ago, in August we'll be two years into this
2 receivership, three months from now. All the
3 investigative work has been done. In June the lawsuits
4 were filed, June of '18. September of '18 the
5 settlements went forward. And in March of '19 the
6 lawsuit against CCCB was filed in this Court.

7 When you look at the timing of that, and you look at
8 that against cases who have looked at timing, cases
9 support releasing the stay. The **Acorn Tech. Fund** case,
10 429 F.3d, is a case where the Court said that when you're
11 foreign to a receivership, there's no reason to provide
12 protection to the receiver of the stay. That's very
13 applicable here because the receiver is looking for
14 protection from this stay, while at the same time
15 litigating and suing and going after Prospect in every
16 possible forum.

17 There is no reason to provide the receiver with any
18 further protection this far into the receivership, where
19 all of the reasons for the stay have already been
20 satisfied, in terms of the receiver getting their arms
21 around it, marshalling the assets, and being familiar
22 with the estate.

23 The third prong is, Is there a colorable claim? On
24 that we have a contract. We have a dispute as to how to
25 interpret Section 13 of the LLC agreement, the transfer

1 provisions. I don't know if there's a dispute over the
2 indemnification provision, but clearly there is a case to
3 be litigated as to whether or not there's been a
4 violation of the transfer provisions by CCCB, and I think
5 we satisfied the issue as to whether there's a colorable
6 claim. We've cited a Rhode Island case which references
7 the colorable claim. My brother says that wasn't the
8 issue, and that may be the case, but there's plenty of
9 law outside of Rhode Island where a colorable claim is
10 that third prong that's widely adopted under *Wencke*.

11 Lastly, your Honor, in this case we think there's a
12 great injustice happening. We think that this is an
13 equitable proceeding, and the stay, injunction is
14 equitable relief. And what's happening in this case is
15 the receiver is using this stay as a weapon. And I think
16 in their brief they were somewhat disingenuous in
17 actually saying that they did not file the CCCB case in
18 order to gain a tactical advantage over Prospect.
19 Nothing illustrates that more than the fact that each
20 time we've continued this motion for leave their
21 intention to file their lawsuit within days prior to the
22 hearing on the motion, and, in fact, when it was most
23 recently scheduled before the last continuance in March,
24 they filed it three days before the scheduled hearing,
25 and then the Court on its own did continue it for an

1 additional period of time. Not only did they use it for
2 their tactical advantage, they're arguing -- they're
3 arguing that they're first to file. And the Court should
4 look at the merits of where the venue should be. So,
5 clearly, that was the motivation for filing it, and that
6 is certainly not the purpose for which that injunctive
7 order and stay was issued almost two years ago.

8 THE COURT: Counsel, one thing. I understand your
9 argument in terms of colorable claim. I also read your
10 papers in terms of venue is not an issue that should be
11 decided by the receivership court. That may be decided
12 at some point by the court or courts that have the case.
13 But under the factors in *Wencke*, should the Court be
14 looking at all at the LLC agreement in terms of venue, or
15 not at all?

16 And the reason I bring that up is because from
17 reading your papers, I noticed when I looked at the LLC
18 agreement, we have a provision dealing with disputes in
19 Delaware, and then we have another provision dealing
20 entitled specific performance with Rhode Island, and it
21 seems you went out of your way in your papers to talk
22 about how the Delaware provision is for substantial
23 controversy, and the Rhode Island provision is for issues
24 of immediate concern; however, the actual document does
25 not use those words at all.

1 MR. HALPERIN: I think our argument is based on the
2 fact that there is a split clause in the contract, and
3 the specific -- the specific performance clause is an
4 exception to the general venue clause.

5 THE COURT: Uh-hum.

6 MR. HALPERIN: And the reasoning that we suggest
7 applies is that because the business is located in Rhode
8 Island, there was an effort to provide a venue for
9 immediate injunctive relief to prevent a threatened
10 breach, to deal with something that truly required a
11 court nearby. And that's really our interpretation of
12 it, because there's really no other logical reason why
13 one would separate immediate harm to prevent a breach or
14 threatened breach from resolving any other issues.

15 THE COURT: It's pretty clear that at least a strong
16 argument could be made with respect to the Delaware
17 provision if there's a damages-type claim. That would
18 absolutely fall under that.

19 I guess where, you know, there seems to be a little
20 confusion, and I understand, well, okay, let's get in
21 what the thought was behind it or how the contract was
22 structured, but what's the real difference when it comes
23 to injunctive-type relief between the two provisions, and
24 which provisions the parties allow, or could it be
25 either, and then we're going to be in the position where

1 the Court gives a relief, or says you can go forward,
2 and, you know, the Chancery Judge and the Superior Court
3 Judge are going to have to make determinations based on
4 motions by the parties in terms of where the most
5 appropriate place is.

6 MR. HALPERIN: I do think that is going to be an
7 issue that is going to need to be resolved, and I do
8 think there is certain relief that, as you pointed out,
9 monetary claims can't be argued that the proper venue
10 under the contract is Rhode Island. That is one of the
11 things that we're seeking is monetary damages. So a
12 court will have to grapple with whether or not one of
13 those cases should be dismissed and moved to another
14 venue.

15 I notice that the one issue that my brother did not
16 brief was venue. But I looked at it, and I'm sure the
17 Court is aware that there is a *prima facie* view that you
18 enforce a venue clause, and there needs to be a
19 fundamental unfairness, which is a heavy burden for the
20 party seeking to get out from under that, that would need
21 to be shown in order to void a clause like that, and that
22 is United States Supreme Court as well as Rhode Island
23 law, and I can provide the Court with the cites.

24 THE COURT: And I'm aware of that. I guess question
25 number one is, where is the venue under the contract for

1 a particular claim? And then you're right, the U.S.
2 Supreme Court, there's really not much in Rhode Island,
3 but Chief Justice Strine, who was Chancellor of the
4 Delaware Chancery Court, has written extensively in terms
5 of not only first to file, but also how first to file may
6 not apply in the cases, so what are the steps we must go
7 through for that?

8 MR. HALPERIN: Well, your Honor, it's an interesting
9 and complicated issue, but I really don't think that it
10 comes into play for the Court deciding whether the
11 receivership stay entered two and a half years ago should
12 be lifted.

13 THE COURT: That's why I asked the question. I
14 certainly want to hear from your brother on that. But
15 those factors, if the Court was to say, look,
16 receivership stay applies, for argument's sake, we're
17 going to get into the factors, and under those factors a
18 choice of venue is in consideration.

19 MR. HALPERIN: I do not believe choice of venue
20 should come up at this stage at all. And the fact that
21 they didn't brief it, I have to believe they might
22 actually think that as well. Undoubtedly, it's going to
23 come up.

24 THE COURT: But, certainly, the first time I saw it
25 in the sur-reply, the fact that since the lawsuit is

1 filed here, there's a compulsory counterclaim, that you
2 should be required if you're going to file it, to file it
3 in Rhode Island. It may not have used the word "venue,"
4 but in a way we're talking about venue.

5 MR. HALPERIN: Well, so that I suspect after
6 December 20, 2019, that lawsuit goes forward, that issue
7 will find its way to your Honor. And we'll fully brief
8 that, and maybe it will be briefed and argued in Delaware
9 as well. But at this stage I don't think either party
10 has done anything more than point out that the clauses in
11 the contract, it appears, clearly does allow for certain
12 cases seeking injunctive relief to be brought in Rhode
13 Island and everything else to be brought in Delaware.
14 And I think that's really as far as the inquiry needs to
15 go today. Now, if the Court should try to decide the
16 appropriate venue as an element of whether the stay
17 should be lifted --

18 THE COURT: And I'm not suggesting that. I just
19 wanted -- from reading the papers, I just wanted to make
20 sure what the attorneys' positions are. That's all.

21 MR. HALPERIN: There is a case in Rhode Island,
22 **Tateosian v. Celebrity Cruise**, 768 A.2d 1248, it's a 2001
23 case. And it goes along the same line as the United
24 States Supreme Court in **M/S Bremen v. Zapata**, which is a
25 leading case: A forum selection clause is *prima facie*

1 valid, and there's a heavy burden to prove that the
2 clause is fundamentally unfair. I think that's
3 essentially the law in most jurisdictions.

4 My brother argues that the standstill agreement that
5 was entered in the CCCB case should be an argument for
6 why leave should not be granted. I say it's exactly the
7 opposite. There is not going to be any harm or any cost
8 or anything to the estate until December 20, 2019. What
9 we've agreed is that if the Court grants leave, the
10 lawsuit will be filed, and we will immediately agree to a
11 stay. And if for some reason under the rules of Delaware
12 a stay is not permitted for an extended period of time,
13 then we would dismiss it without prejudice, if that was
14 necessary.

15 So there is nothing that's going to be harmful, but
16 what it does is it gives a little bit of a chance to get
17 closer to a level playing field. The argument isn't
18 going to be that their case has been pending for a year
19 now, and if that's what they're seeking for getting it
20 filed in the first place, we're simply trying to assert
21 our rights where we know the venue allows us to and not
22 be prejudiced by them using this receivership stay as
23 they have already.

24 THE COURT: I understand that argument. You don't
25 want to be in a position where there's a stay, and

1 something is filed a year from now, and they say, look,
2 we filed a year and a year after ago. I understand.

3 MR. HALPERIN: My last argument, and I'm not going
4 to go into any detail on this because we briefed it
5 extensively, is that it has always been anticipated
6 throughout these receivership proceedings since that
7 settlement was proposed that the receiver knew they were
8 walking into litigation. We told them. And your Honor
9 has acknowledged there are issues that had to be resolved
10 in other proceedings. The federal court has acknowledged
11 it. Mr. Wistow has acknowledged it. We say the time is
12 now; otherwise, we're going to continue to be prejudiced
13 by being delayed, and that's not the purpose of the
14 receivership's stay.

15 THE COURT: Counsel, I just want to address the
16 first issue that we started with, which is I imagine
17 you're still pressing the request to get relief from the
18 stay filed with the Department of Health and the Attorney
19 General's Office?

20 MR. HALPERIN: Yes. I should have started my
21 argument by saying that, because that is going to be done
22 by Prospect CharterCare, LLC, and Mr. Russo was going to
23 address had that with your Honor.

24 THE COURT: Why don't we keep them separate at this
25 point. I'll leave it to Attorney Wistow, do you wish to

1 argue on the filing of Delaware, and then we'll go on to
2 Mr. Russo, who will make a presentation?

3 MR. SHEEHAN: We prefer to hear from Mr. Russo. The
4 arguments, in many cases, will be the same.

5 THE COURT: That's fine. We'll do that. I'll allow
6 Attorney Russo to make his arguments on the motion.

7 Thank you very much.

8 MR. RUSSO: Thank you. Your Honor, I'm not going to
9 repeat what Attorney Halperin said with regard to **Wencke**
10 and the other issues that would also touch on this
11 request for relief. I'm just going to focus on why it's
12 appropriate to try and address the regulatory community
13 and ask them whether the proposed settlement agreement
14 does in fact incorporate a conversion under the Hospital
15 Conversion Act, or, conversely, if it's something that
16 runs counter to the license that was issued under the
17 Hospital Licensure Act, which is 23-17, because the
18 license incorporates the conversion; in other words, you
19 have to operate the licensed entities in strict
20 compliance with the conversion. So that's what I'm going
21 to cover.

22 A conversion in Rhode Island, your Honor, if you
23 look at 23-17.14-4 is the definition of conversion. And
24 for the important point for this case, it means the
25 conversion of the voting authority of a hospital, not

1 necessarily the conversion of the hospital assets
2 themselves, but the voting authority. And in the
3 proposed settlement agreement, what the receiver has done
4 is it has taken a transfer of the, quote, CCCB's hospital
5 interest, and that includes the 50 percent nominees on
6 the board of Prospect CharterCare.

7 Now, why does that touch on or why does that go
8 directly to the voting authority of a licensed hospital?
9 My brothers say in their objection, at Page 22 of their
10 objection, they say: Well, Prospect CharterCare isn't a
11 licensed hospital, so they wouldn't be able to bring this
12 anyway. What that shows, respectfully to my brothers, is
13 that they really don't understand the conversion that
14 took place, because what you have to do in a hospital
15 conversion, the acquiror side of the equation has to
16 demonstrate where is the voting control of the hospital.
17 And the voting control of the hospital over all of the
18 issues that would be voted on that fall under the
19 Department of Health or the Department of Attorney
20 General regulation are within Prospect CharterCare. We
21 had to demonstrate that to both agencies, and we actually
22 had a list in the LLC agreement, what would be those
23 items that the board would vote on?

24 The whole concept of that conversion and that 50/50
25 board, your Honor, was to have a for-profit aspect to it

1 and to retain the non-profit community healthcare aspect
2 to it. And those are the items that they vote on at the
3 Prospect CharterCare level, which is in that LLC
4 agreement.

5 So when the settlement agreement transfers that
6 voting authority over to the receiver, it converts the
7 voting authority of that hospital. And, again, when you
8 have a moment, if you review the definition of conversion
9 at 23-17.14-4 subparagraph 6, you will clearly see that,
10 your Honor.

11 THE COURT: Counsel, let me ask, is there anything
12 that has happened thus far, the UCC-1 or the beneficial
13 agreement that was entered into that it's your position
14 impacts it, as opposed to things that may happen in the
15 future?

16 Do you understand what I'm asking?

17 MR. RUSSO: Sure. I think the things that have
18 happened so far is there's been direct communications to
19 the board members on the Prospect CharterCare board
20 through CCCB, but I fully -- I don't have a written
21 document, but I believe at this point CCCB, through
22 Mr. Land, is operating at the direction of the receiver's
23 special counsel, they have contacted board members asked
24 to influence how they vote, they filed this lawsuit now.
25 So now what's happening is rather than having a board

1 that's being influenced by community healthcare issues,
2 they have a board being influenced by how do we get the
3 most return for the pension plan. And that is vastly
4 different, and that's happening now.

5 THE COURT: Maybe I just need to ask a question a
6 little, but I understand there are these factual issues,
7 you're saying, but what's happened so far in terms of the
8 settlement agreement, paper-wise, which is this UCC-1,
9 there's been an agreement to those things -- and I
10 understand you may have arguments on the others -- do
11 those things, is it your position, affect the conversion
12 or the Department of Health, the final conversion?

13 MR. RUSSO: It is my position that it does, your
14 Honor, and I'll explain why. We made an argument early
15 on in the case that that transfer had not been
16 effectuated by the settlement agreement, and, therefore,
17 our petition, the regulatory agencies under Section 8 of
18 the APA, which only requires that we petition, we don't
19 have to join anybody, was not an action against the
20 receivership estate. And what your Honor ruled, and,
21 obviously, we're not here to challenge that ruling, is
22 that, no, once that settlement agreement was entered
23 into, that right to that hospital interest became an
24 asset of the estate.

25 So I would argue by entering into that settlement

1 agreement, they have effectuated a transfer per this
2 Court's rulings, that hasn't been finalized, but it's
3 effectuated, and they've taken steps to date to advance
4 that transfer.

5 So if I understand your Honor's question correctly,
6 and if I don't, I apologize, but I interpret the question
7 to be, Is it timely? I believe it is timely, and now
8 there will be further action taken under of the guise
9 that we have this 15 percent -- not 50 -- well, but we
10 have this hospital interest, and, therefore, a part of
11 that is the voting authority on that board.

12 THE COURT: The issue is not -- well, what the Court
13 ruled on before is that it was subject to the stay,
14 therefore, you need to get relief from the stay. So the
15 question is, if the Court was to consider relief from the
16 stay, is it basically what you would have submitted
17 before, which is asking all these things? Is it limited
18 to what's been done and what's happened so far? And I
19 want to start by concentrating on the documents that the
20 receiver has entered into, and whether it's Prospect's
21 position, or your client's position, that what has been
22 done documentation-wise as far as effectuating the
23 settlement agreement thus far violates it?

24 MR. RUSSO: It would be limited, your Honor, because
25 I think the status quo now is such that a number of those

1 issues have been surpassed by events that have taken
2 place. So it would be a request to the regulatory
3 agencies to ask them whether this is a conversion, which
4 means that if the settlement agreement receives final
5 approval, one of the things that's going to have to
6 happen is the regulatory agencies are going to have to
7 pass on it.

8 THE COURT: But isn't there a difference -- I
9 understand using the words the settlement agreement
10 receives final approval, but in that case, Judge Smith
11 may say in the federal court when somebody's argument
12 says, Fine, now we're going to allow a period of time we
13 need to get approval.

14 My question is a little different. Is there
15 something that has occurred up until today, not what may
16 happen in the future, as far as what I referenced with
17 the UCC and others, that it's Prospect's position that
18 already there may be a violation?

19 MR. RUSSO: Yes, your Honor. Your Honor put
20 controls on this in a decision and said, I don't want any
21 exercise of any rights on that until this is done.
22 However, we have had exercise of rights under that
23 transfer. It's very clear.

24 THE COURT: But if -- I'm sorry. I'm just trying to
25 drill down. If those things that you're alleging

1 occurred after, put those aside, what about what happened
2 before? Would that require -- would that have been a
3 change of control or conversion?

4 MR. RUSSO: Yes, your Honor. You have a document
5 entered into where a hospital interest is transferred --

6 THE COURT: That's all I'm trying to get at.

7 MR. RUSSO: -- and you have security taken to secure
8 that interest, that amounts to a conversion, in our
9 opinion. And your next question was, and I take it to be
10 a very logical question of what has happened since then,
11 and our position is there have been actions taken in
12 advance of that transfer of interest where it is very
13 timely now to again ask these regulatory agencies to pass
14 on this issue.

15 And, also, this is a court of equity, and we have to
16 look at what's being done, what can be done in some type
17 of a cost and time efficient manner. We know where the
18 receiver is going. The receiver wants to take, you know,
19 final control of this interest, which is going to carry
20 voting control. You don't in the normal course ask the
21 regulatory agencies to approve that once it's been done.
22 The last time that happened somebody got fined a million
23 dollars. You try not to do that. It's now time to ask
24 them, this is what's been put together, this is what's
25 been agreed to; is this a conversion? What restrictions,

1 if any, would be put on it? Et cetera.

2 I mean, the regulatory agencies may very well say,
3 we're going to approve this, but there will be
4 restrictions on what your nominees can vote on. They
5 can't exercise their fiduciary obligations in a community
6 hospital setting, in an acute care hospital setting to
7 advance pension issues. You simply have to vote on the
8 issues that are outlined in the LLC and that affect
9 community healthcare. I mean, those are the type of
10 things that have to be done so this doesn't become a
11 free-for-all where we're using that voting control as
12 leverage. That's why they include voting authority in
13 the conversion, because it has to be regulated.

14 THE COURT: In your papers you raise a couple of
15 alternatives; one is to allow us to do it, and the other
16 is to require the receiver to do it.

17 MR. RUSSO: Yes. I wouldn't think it is beyond a
18 situation that has been encountered in the past in these
19 type of receiverships where the Court may instruct the
20 receiver. That's, obviously, your discretion. You may
21 say, I'm not going to lift the stay, but I am going to
22 instruct the receiver to make a petition to the
23 regulatory authorities and have them determine whether
24 this is a conversion or not, and, if so, what
25 restrictions do we put on it, et cetera. So I think that

1 is -- that's obviously an option that your Honor has.

2 THE COURT: And is this portion the motion also
3 subject to the standstill agreement of the parties or
4 not?

5 MR. RUSSO: I would defer to Attorney Halperin, but
6 I believe it is.

7 THE COURT: We can deal with that after.
8 Anything else?

9 MR. RUSSO: The only other thing, you Honor, the
10 only thing my brothers say in here, they cite the
11 Attorney General's position that the Administrative
12 Procedures Act can't be used to seek review in a hospital
13 conversion. I would just ask your Honor as you
14 deliberate over this, if you look at Section 34 of the
15 Hospital Conversion Act, that divides judicial review
16 into two parts. One is before a license is issued, then
17 any interested party can take action. That's in the very
18 first part of 34. Then 34 concludes by saying, Upon
19 either grant or denial of the conversion license, then
20 only the transacting parties can have judicial review of
21 that decision under the Hospital Conversion Act.

22 That does not prevent somebody from using Section 8
23 of the APA to ask for a declaratory ruling
24 post-conversion. It just doesn't cover it. However,
25 what I would say to the Court if we were granted leave to

1 pursue this, and we've already had these discussions, is
2 we would sit with the Attorney General's Office and
3 Department of Health and find out what is the vehicle --
4 we don't want to fight over a procedural vehicle, and I
5 think everyone will agree there is a vehicle to determine
6 this. So I don't think that this rises or falls on an
7 APA argument.

8 THE COURT: So similar to what Attorney Halperin has
9 said, it's an issue for another body based on how it's
10 presented to decide.

11 MR. RUSSO: Yes, your Honor. And, quite frankly,
12 it's an issue through appropriate approach and attorneys
13 talking should be avoided, because that's not a cost we
14 should incur and argue about procedure.

15 THE COURT: Thank you.

16 MR. HALPERIN: Your Honor, I want to correct a
17 misstatement that I made that the complaint that was
18 submitted does not address the indemnification issue.

19 THE COURT: I read it.

20 MR. HALPERIN: We referenced it in our memo.

21 THE COURT: Just a question. So with the
22 indemnification, you're looking at another action in the
23 lower court in Delaware?

24 MR. HALPERIN: That could become part of the case
25 that we then bring. It also could be brought in the

1 federal court case, if, you know, that goes that far in a
2 cross-claim, it could be brought in different venues.

3 THE COURT: Thank you very much.

4 Mr. Sheehan, please. I know you heard a lot of
5 arguments. Take your time.

6 MR. SHEEHAN: Your Honor, Mr. Halperin started with
7 the argument that the receivership stay does not apply to
8 the proposed suit in Delaware, and I believe that
9 argument is both absurd and precluded by the Court's
10 prior analysis. That the settlement agreement gives the
11 receiver a contingent right in the 15 percent interest,
12 and that constitutes property of the estate, and that
13 brings it under the receivership's stay, and,
14 therefore -- I don't want to use the argument of the law
15 of the case -- but the analysis is exactly the same, your
16 Honor, then as it is now. Nothing has changed.

17 THE COURT: I think that's been appropriately
18 briefed. I'd like you to concentrate more on --

19 MR. SHEEHAN: Right. The issue is not whether the
20 proceedings are barred by the stay. They are. The issue
21 is whether they should get relief from the stay. And
22 they're asking for relief to commence suit in Delaware
23 and commence administrative proceedings. And, by the
24 way, your Honor, the standstill agreement does not apply
25 to the administrative proceedings.

1 I'd like to deal first with the proposed Delaware
2 complaint. Your Honor, just as Prospect asked Chief
3 Judge Smith to rule that the receivership is illegal,
4 they are going to ask the Delaware Chancery Court to
5 supervise and discipline the receiver and to evaluate the
6 decisions of the receivership court.

7 Your Honor, I have their proposed complaint, and it
8 is based entirely on the settlement agreement and the
9 transfer of the 15 percent under the settlement
10 agreement, and it asks the Delaware Court to invalidate
11 the settlement agreement. It expressly asks the Court to
12 invalidate the entire settlement agreement. It provides
13 the Delaware Court with a copy of this Court's decision,
14 and asks the Delaware Cort to interpret this Court's
15 decision.

16 It asks the Court to interpret the Rhode Island
17 Hospital Conversion Act and regulations, a Delaware
18 Chancery Court. It makes factual allegations concerning
19 the receiver, that the receiver has acted in concert with
20 CCCB to disrupt operations of Prospect CharterCare, that
21 CCCB has provided confidential information to the
22 receiver. It's going to ask the Chancery Court to rule
23 that Mr. Del Sesto has improperly received confidential
24 information in his capacity as receiver. A Delaware
25 Chancery Court.

1 Now, paragraph 5 of the complaint expressly asks the
2 Court to declare that all prior agreements between CCCB
3 and Del Sesto in breach of the LLC agreement are null and
4 void. That means the settlement agreement is null and
5 void.

6 Now, my brother had suggested that the existence in
7 the standstill agreement of an agreement to stay the
8 Delaware action somehow changes the analysis and entitles
9 him to proceed today. I'd like to say first, your Honor,
10 that not all stays are alike. The stay in place now is
11 the receivership stay administered by this Court pursuant
12 to criteria which the *Wencke* case sets forth; for
13 example, under a process where parties can seek leave for
14 relief from the stay, and the receiver can oppose that
15 relief. That all would take place before this Court.
16 That's not what's in the standstill agreement. What's in
17 the standstill agreement is a stay that would be
18 administered by a Delaware Chancery Court, not this
19 Court, a stay that can be unilaterally removed without
20 right of recourse to the receiver by Prospect CharterCare
21 in December, eight months from now, regardless of the
22 impact it would have to the receivership, the receiver
23 will not even be heard to argue it should not be removed
24 because of the impact on the receivership.

25 Now, the request to lift the stay, with respect to

1 filing claims with the Attorney General and the
2 Department of Health, we do not have what they intend to
3 do. What they're asking from the Court is a blank check,
4 permission to, quote, sit down with the Attorney General.
5 They haven't even provided the complaint they have in the
6 Department of Health case, and they're asking the Court
7 to give them leave to file it. We haven't had an
8 opportunity even to see it; therefore, their request for
9 that relief is completely inappropriate because the Court
10 cannot engage in the **Wencke** factors not knowing what
11 they're going to do. And to be sure, your Honor, were
12 the Court to give them approval, there will be litigation
13 as to what the Court's approval extended to once they
14 act, because we don't know what they're going to do. We
15 think they will push the envelope, to put it mildly.

16 Now, my brother suggested the APA has nothing to do
17 with this. The Rhode Island Attorney General has already
18 ruled that there's no basis for a proceeding before it in
19 connection with the transfer of the 15 percent interest
20 because that was not an APA proceeding. He's basically
21 asking the Court to grant him leave to bring an action
22 that the Attorney General has already said it won't
23 accept.

24 Now, that's the third **Wencke** factor, the colorable
25 claim. What could be less colorable than seeking relief

1 to assert a claim that the Attorney General has already
2 said would not lie.

3 Now, getting to the **Wencke** factors, your Honor, my
4 brother looks at the first element, whether refusing to
5 lift the stay genuinely preserves the status quo or
6 whether the moving party will suffer substantial injury
7 if not permitted to proceed, and construes that as being
8 limited to the issue of, Has the receiver had enough time
9 to evaluate the case?

10 But that's not the law. The law is, and we've cited
11 the case to your Honor, the Court should give
12 appropriately substantial weight to the receiver's need
13 to proceed unhindered by litigation, and the very real
14 danger of litigation expenses diminishes the receivership
15 estate. This is not an issue merely of if the receiver
16 has an amount of time, it's whether the receiver needs to
17 proceed unhindered by litigation, and whether this is a
18 wasteful expenditure of assets of the receivership
19 estate.

20 And, your Honor, the circumstance we have here is my
21 brothers can obtain exactly the relief they seek by
22 proceeding before this Court in the CCCB v. Prospect
23 case.

24 THE COURT: Let me stop you.

25 MR. SHEEHAN: Please.

1 THE COURT: The LLC agreement that's before me, I
2 understand the receiver at that point can add Prospect
3 CharterCare, LLC, and whether some of the things aren't
4 articulated as well as they could be, it was definitely
5 an agreement between the parties with certain types of
6 claims that could be heard in Delaware or apply under
7 Rhode Island law, and the receiver has chosen to go
8 forward saying Prospect has violated -- I'm sorry -- CCCB
9 has decided to go forward and file a lawsuit saying
10 there's certain things in the agreement they haven't
11 complied with. Isn't it kind of using it as a sword
12 instead of a shield?

13 MR. SHEEHAN: Absolutely not, your Honor. The
14 sword-versus-shield analysis in all of the cases my
15 brother cited involved circumstances where the debtor
16 sought to preclude a defendant from asserting
17 counterclaims against the debtor in a proceeding
18 commenced by the debtor. That's not here, your Honor.
19 They may proceed against CCCB. None of those cases say
20 that you may proceed with use of the stay to require
21 litigation in a forum that makes sense for the
22 receivership is using the receivership as a sword and not
23 a shield.

24 THE COURT: So does Prospect then require relief
25 from stay to file a counterclaim in the state court

1 action?

2 MR. SHEEHAN: All that Prospect has to do is ask the
3 defendant -- I mean, CCCB, and that would be granted.
4 They said that they wanted to have a stay in that
5 proceeding, your Honor.

6 THE COURT: I don't mean that. I'm just saying one
7 of the things I noticed from your sur-reply is that one
8 of the reasons we shouldn't go there is we have a proper
9 place here, and they could file their counterclaim in the
10 state court action. But my question is, if I interpret
11 the receivership stay, and you're asking me to interpret
12 it, doesn't that mean that to file any type of a
13 counterclaim against CCCB because it's a contingent
14 interest would require relief from the stay?

15 MR. SHEEHAN: Your Honor, we absolutely do not
16 oppose -- on behalf of the receiver I state we do not
17 oppose their seeking to lift the stay to file a
18 counterclaim and answer a counterclaim in the CCCB v.
19 Prospect case. They haven't asked for that, your Honor.

20 THE COURT: No. I'm asking that, because the
21 question becomes if they're allowed to bring the claims,
22 do I drill down and start dealing with venue issues?

23 MR. SHEEHAN: No, your Honor. There's an agreement
24 first that the CCCB case will be stayed, so nothing needs
25 to be done after that complaint and answer -- I'm sorry

1 -- answer and counterclaim are filed.

2 And as far as drilling down, your Honor, on the
3 venue claims, the Court absolutely must drill down on
4 those venue claims today, because the issue of colorable
5 claim under **Wencke** raises the venue claims.

6 If -- my brothers would be foreclosed from
7 proceeding in Delaware because they should have brought
8 claims as a compulsory counterclaim, they have no
9 colorable claim in Delaware. If CCCB in the CCCB v.
10 Prospect case has the right to come before your Honor and
11 ask to enjoin Prospect from proceeding in Delaware and
12 asserting claims that would be compulsory counterclaims
13 in Rhode Island, there is no colorable claim in Delaware.

14 So what we come to, your Honor, is the venue issue,
15 and, your Honor, when one looks at the venue clause, and
16 I'd like to hand up to the Court --

17 THE COURT: I have it in front of me. You didn't
18 give me the first page. I have Pages 38 and 39, which
19 are the operative pages.

20 MR. SHEEHAN: That's right, your Honor. I'm going
21 to hand up 37 so you have it.

22 THE COURT: I have 37 as well. You can give it to
23 your brother counsel.

24 MR. SHEEHAN: Okay. I'm going to just hand up then
25 this blow-up of the two sections I'm talking about. It's

1 a little easier to read.

2 THE COURT: That's fine.

3 MR. SHEEHAN: Your Honor, the first section that
4 I've handed up with a little "i" is Section 17.4(b) (i),
5 and what I've highlighted, your Honor, is that provision
6 which is the Delaware venue selection clause -- forum
7 selection clause provides an exception. It says, Except
8 as provided in Section 17.5, so it does not apply to
9 actions brought under 17.5, and if we turn to 17.5, your
10 Honor, which is the second section I highlighted, it
11 again states that notwithstanding anything to the
12 contrary.

13 Now, what is permitted under this section? What I
14 suggest to your Honor is permitted is if a party has a
15 claim for injunctive relief or specific performance, that
16 party has, in addition, the right to assert any other
17 right or remedy to which the non-briefing party may be
18 entitled at all or in equity. In other words, the
19 ability to assert a claim for injunctive relief or
20 specific performance opens the door to all claims. And
21 the reason for that, your Honor, is it makes no sense to
22 have venue in two different locations involving two
23 different disputes. That is the logical meaning of this
24 sentence that starts: Accordingly, in addition to any
25 other right or remedy to which the non-briefing parties

1 may be entitled at law or in equity, they shall be
2 entitled to enforce any provision of this agreement -- et
3 cetera, et cetera -- by seeking specific performance for
4 injunctive relief.

5 So, therefore, the CCCB action involves all of the
6 disputes and, certainly, the defendants in that action
7 are obligated to assert any claims that would be
8 compulsory counterclaims on any matters.

9 So my brother's suggestion that we didn't brief
10 venue is completely wrong. We briefed it in our
11 opposition memo. We briefed it in our sur-reply, and the
12 complaint that CCCB filed expressly articulates the
13 argument that I just made to your Honor, that the
14 bringing of an action for specific performance in
15 injunctive relief opens up the dispute to be entirely
16 litigated in Rhode Island.

17 So my brother's suggestion that the Court should not
18 look at the venue question is self-serving. It's because
19 it leads in a poor direction for him.

20 THE COURT: Take me through once again the language
21 in terms of why you believe that the specific performance
22 in 17.5 opens up to the other claims.

23 MR. SHEEHAN: Your Honor, the second section that
24 I've highlighted begins "Accordingly."

25 THE COURT: Oh, okay.

1 MR. SHEEHAN: That is the section primarily that
2 I'm relying on. And I can address it, if your Honor
3 wants to take a minute to look it over, or I can just
4 jump into it.

5 THE COURT: That's fine. Go ahead.

6 MR. SHEEHAN: First, that section I've highlighted
7 entitled, CCCB, to bring a suit for specific performance
8 for injunctive relief. That is indisputable. It clearly
9 does that. And then the question is what in addition to
10 that can CCCB assert, and the answer is in the sentence:
11 In addition to any other right or remedy to which the
12 non-briefing party may be entitled at law or in equity.
13 That allowance opens up all claims, once one has a claim
14 for specific performance for injunctive relief.

15 So the venue provision that we have here, your
16 Honor, absolutely not only permits but obligates Prospect
17 when it responds to the CCCB complaint to assert any
18 claims that rise out of the same transaction, such that
19 there would be compulsory counterclaims, and all of the
20 claims asserted in the Delaware complaint arise out of
21 the same transaction and would be compulsory
22 counterclaims.

23 My brother's suggestion that this section deals only
24 with immediate relief is simply wrong. It refers to
25 permanent injunctions. It refers to pre a specific

1 performance. That is a remedy that is accorded after a
2 full trial. That is not a provisional remedy. Specific
3 performance is akin to damages. It's just another
4 element of relief.

5 So that's the way it should be read, your Honor, and
6 the only way it makes sense, because, otherwise, you have
7 the prospect that your Honor outlined, which is they
8 bring suit in Delaware, and the fight develops between
9 the Court in Rhode Island's interpretation of what
10 constitutes a compulsory counterclaim and the Delaware
11 Court's determination as to what constitutes a compulsory
12 counterclaim involving the Rhode Island proceeding. It
13 creates a conflict between jurisdictions, to be sure, and
14 it makes no sense as a matter of mitigation practice to
15 have a complete trial on the remedy of specific
16 performance in one venue and have a complete trial on the
17 issue of damages in another venue. And it may be that if
18 that was expressly set forth, the Court would be bound by
19 that language, but that's not what we have here. We have
20 the, in addition to any other rights you have may have at
21 law or in equity.

22 Now, what is the effect on this receiver of allowing
23 this complaint to be filed in Delaware, and what is the
24 effect on CCCB? And the reason why I mention that, your
25 Honor, in the context of a motion for relief from a

1 receivership stay, is that CCCB's assets are pledged
2 pursuant to the settlement agreement to the receiver for
3 the benefit of the plan. So, therefore, CCCB's expenses
4 ultimately involve a reduction in plan assets and
5 receivership property. They both must be considered.

6 Now, CCCB and the receiver both will be required to
7 retain Delaware counsel. The suggestion that this
8 agreement for a stay would relieve them of the need to
9 have a Delaware attorney present when the issue of the
10 stay is argued in Delaware, to have a Delaware attorney
11 opine on the law of Delaware with respect to the issues
12 presented by that request for a stay is absurd. That
13 would be highly reckless on the part of CCCB and the
14 receiver when there's so much at stake.

15 Now, my brother would say that the receiver does not
16 have to get involved because he's not a party. Well, he
17 would be an indispensable party, your Honor, because they
18 are asking for an adjudication of rights he purported to
19 receive under contract. So it directly involves an
20 interest in property that he claims, the receiver claims.
21 It falls under, I seem to recall it's Section 19(a) (1).
22 We argued venue -- I'm sorry -- indispensable parties is
23 another connection in this case, your Honor, and that's
24 the standard. They claim an interest in the subject
25 matter of the action.

1 Moreover, your Honor, there's an issue of *res*
2 *judicata* which applies to parties and their privies, and
3 CCCB and the receiver are so closely intertwined in this
4 connection because their parties to this agreement,
5 settlement agreement, that undoubtedly Prospect would
6 argue that the receiver is in privity with CCCB and would
7 be bound by any determination of the Delaware litigation.

8 So the receiver has to go to Delaware, has to retain
9 counsel, has to participate in that proceeding, has to
10 intervene. Now, the consequences on the receivership
11 estate once the receiver is down there are enormous.
12 Basically, they're conferring on the Delaware Court the
13 ability to supervise the receiver and adjudicate the
14 validity of the receiver's conduct.

15 What's the effect of continuation of the
16 receivership stay?

17 THE COURT: What the Delaware Chancery Court would
18 be deciding is whether or not there was a violation or a
19 breach of the LLC agreement vis-à-vis CCCB and the
20 Prospect members.

21 MR. SHEEHAN: My brother suggested to your Honor
22 that they're going to be bring an indemnity claim, and he
23 suggested to your Honor that through their indemnity
24 claim they hope to obtain all of the assets of CCCB.
25 Basically, they're going to take the settlement that has

1 been promised to the receiver and take it for themselves
2 in an indemnity action. And as they pointed out, they
3 don't put that in their complaint. They do mention it in
4 their memo. And Mr. Halperin candidly acknowledged that
5 that's what they intend to do.

6 THE COURT: No, I understand that. I guess we're
7 back to the question, if they believe they have an
8 indemnity claim, I guess what you're saying is that they
9 can still bring it, and it should be adjudicated in the
10 counterclaim, but, certainly, whether it's Delaware, they
11 have a right to have their indemnification claim
12 adjudicated.

13 MR. SHEEHAN: Your Honor, the question I was
14 responding to was your Honor's question that, isn't all
15 that's going to happen in Delaware is an adjudication of
16 the right to the 15 percent transfer?

17 THE COURT: I didn't ask that. I said the rights
18 under the LLC agreement.

19 MR. SHEEHAN: The rights under the LLC agreement.
20 Yes, you're right, your Honor, but it's not really the 15
21 percent, and I mistook it at that. Ultimately, they're
22 going to claim all their litigation expenses in all of
23 these cases should be paid by CCCB out of the settlement.

24 THE COURT: And that's why I asked the question.
25 And now we're talking about the Court's business calendar

1 in Delaware, whether it be the Chancery Court has the
2 ability to give an award.

3 MR. SHEEHAN: That may be the case, your Honor. But
4 we have a situation now where they're admitting that they
5 will be proceeding in Delaware on a relief that's not set
6 forth in their complaint that we haven't had the
7 opportunity to brief. So they're asking for a blank
8 check there also, just as they do with the AG and the
9 Department of Health, allow us to proceed, but we're not
10 going to tell you what we're going to ask for, and we're
11 certainly not going to put it in writing.

12 THE COURT: What about the other option, which is
13 receiver has the opportunity to get clarification or get
14 an opinion from the AG or the Department of Health?

15 MR. SHEEHAN: Your Honor, this is the law with
16 respect to that issue. First, the AG has already said
17 that no relief lies with them.

18 With respect to the Department of Health, the
19 Hospital Conversions Act -- my brother says we don't
20 understand the law. I beg to differ. We read the
21 statutes, and we know what they say. They say the
22 Hospital Conversion Act applies only to a hospital, and
23 the only hospitals in this case are the subsidiaries of
24 Prospect CharterCare. And my brother says, Well, control
25 relates to control over those hospitals, not merely the

1 hospitals themselves. The entity that controls those
2 hospitals 100 percent both if the settlement agreement
3 goes through or if it does not go through is Prospect
4 CharterCare. The settlement agreement does not affect
5 the voting control of the subsidiaries' one percent. Not
6 at all. Prospect CharterCare is a 100 percent
7 shareholder in those entities. It will remain the 100
8 percent shareholder in those entities. What will change
9 is the shareholding in Prospect CharterCare. And the
10 statute does not apply to that relationship, number one.

11 Number two, your Honor, the Department of Health and
12 Attorney General approved the purchase and sale agreement
13 and the LLC agreement in connection with the conversion.
14 Those documents provide for certain permitted transfers,
15 and one of the those permitted transfers is to an
16 affiliate. And, your Honor, we have briefed this issue
17 before your Honor and would have briefed it again today
18 if they had provided the complaints that they intended to
19 submit to these administrative bodies. But we refer to
20 it in our memo, and we ask the Court to refer to it to
21 the extent it's relevant.

22 THE COURT: I guess my question is pretty narrow.
23 One of the options is either let us do it or order the
24 receiver to do it. Your position is there's no authority
25 to ask.

1 MR. SHEEHAN: Your Honor, we could ask the Attorney
2 General to reconsider his decision that no remedy lies
3 with him. We could ask the Department of Health to
4 answer a declaratory judgment that this is a permitted
5 transfer under the affiliate clause of the LLC agreement.
6 Those seem appropriate for regulatory bodies.

7 Now, your Honor, I want to emphasize one thing.
8 What we're here arguing about is a stay, not a bar. My
9 brother has repeatedly referred to what exists in the
10 current case as a bar on it asserting rights. There's no
11 bar. There is a stay, a delay.

12 The issue is not whether they can proceed to assert
13 certain rights, but when. At this point, when and where.

14 The effect of the stay on Prospect continuing, my
15 brother alleges the prejudice from that is the Delaware
16 Courts if and when they proceed in Delaware will give
17 more weight to the Rhode Island proceeding because it has
18 been pending longer.

19 Now, as the Court observed, the Delaware Courts are
20 well aware first that the first-to-file rule is not
21 always applicable. Second, they can understand and read
22 agreements as to why the Delaware proceeding was not
23 commenced earlier. And, third, and perhaps most
24 importantly, there's an expressed provision in the
25 standstill agreement that delaying in bringing suit in

1 Delaware shall not prejudice Prospect. The parties have
2 stipulated to that. So the parties are foreclosed from
3 even making the argument, and there certainly is a very
4 insufficient warrant to merit an allowance of suit in
5 Delaware, given the remoteness of that risk ever
6 occurring and the fact that the parties have already
7 dealt with it.

8 Prospect has to show for purposes of prejudice more
9 than it is being delayed. By definition a stay is delay.
10 It has to show what prejudice is caused by the delay.
11 And that's all they can come up with, a speculation that
12 a Delaware Court will reach a conclusion contrary to fact
13 and contrary to the parties' stipulations.

14 Now, what is the injury to Prospect of keeping the
15 receivership stay in place, compared to the situation if
16 the receivership stay is lifted and Prospect proceeds
17 under the standstill agreement? There is no prejudice,
18 because eight months from now on December 1st, 20 days
19 before that stay in Delaware could be lifted in any
20 event, they can be back here, and they can then address,
21 in the context of the time when it's meaningful, what the
22 impact is on the receivership estate and what the impact
23 is on them.

24 And my brother suggests that the receivership has so
25 crystalized that a stay is no longer necessary, ignoring

1 that the receiver hasn't been able to get past
2 square-one. My brother has done everything to block the
3 receiver from achieving any kind of a settlement with any
4 defendant in this case, and nevertheless he suggests that
5 somehow this receivership is so well along that this will
6 not constitute any interference with the receivership.

7 This Court in connection with the preliminary
8 settlement approval, or, rather, this Court's approval of
9 the settlement held that it was premature to decide the
10 issues of the *bona fides* of this transfer then. It is --
11 because those rights had not be asserted, and then the
12 Court protected those rights with the stipulation and the
13 order that the receiver could not act on those rights
14 until there was final approval.

15 That is the situation we find ourselves in today.
16 There is still no final approval. And my brothers have
17 the temerity of arguing to your Honor to suggest we have
18 violated the Court order with respect to taking actions
19 to enforce that interest without having -- they could ask
20 for judgment in contempt. They could ask the Court for a
21 ruling on that issue. It is unbelievably cavalier and
22 reckless to simply assert it in the argument in another
23 matter.

24 If the Court is going to give any credence to the
25 suggestion that the receiver has violated this Court's

1 orders, it should do so in a forum devoted to that issue.
2 And I would beg your Honor to schedule that hearing
3 immediately so that can be determined. Certainly, it
4 should not be done as an aside in connection with a
5 litigating party seeking relief. It goes to the
6 foundation of what the receivership court is doing and
7 what the receiver is doing. It's at the heart of the
8 matter.

9 We have to assume until that hearing takes place
10 that the receiver is acting in accordance with the orders
11 of this Court. And, certainly, there's been no evidence
12 to the contrary. Given that, your Honor, it's just as
13 premature now to allow adjudication of their rights
14 transferred to the receiver as it was when the Court
15 ruled on that issue in connection with the receivership.
16 It's premature because we don't have final settlement
17 approval, and if the settlement is not approved, the
18 Delaware lawsuit disappears, at least as far as the
19 receiver is concerned.

20 It is entirely -- the disapproval will entirely moot
21 that settlement. Moreover, your Honor, we've been
22 ordered to a mediation to attempt to achieve a global
23 settlement. If that succeeds, it completely moots the
24 Delaware action. Those events between now and December
25 of a settlement or a denial of settlement approval will

1 completely moot the Delaware action, and it will occur
2 before Prospect could move in Delaware, even under the
3 standstill agreement. That's why at this time in the
4 receivership it is inappropriate and premature to put the
5 receiver in the position of litigating in Delaware the
6 effective rights that the receiver hasn't yet received.
7 That really is putting the receiver in one court saying,
8 Please approve this settlement, and in another court
9 trying to defend rights that have not yet been approved.
10 That is a gross hindrance on the receiver.

11 So that first issue, your Honor, the relative weight
12 of keeping the receivership stay with respect to the
13 interests of the receiver, vis-à-vis those of Prospect,
14 are very strongly in favor of the receiver, your Honor.

15 The issue of the lack of prejudice to Prospect from
16 keeping the receivership stay is very strongly in favor
17 of the receiver.

18 And then we come to the third **Wencke** factor, which
19 is the merits of Prospect's claims.

20 Now, insofar as those claims are compulsory
21 counterclaims, they are meritless in Delaware. Insofar
22 as they're compulsory counterclaims in the Rhode Island
23 case, they cannot be asserted in Delaware. Delaware has
24 Rule 13, and we have Rule 13, and that's what Rule 13
25 requires.

1 With respect to Prospect Medical as a plaintiff,
2 it's not even a party to the LLC agreement. It has no
3 claim for breach of contract in Delaware. And when the
4 **Wencke** factor states meritless claims, they decided to
5 submit a unified complaint with Prospect Medical in it.
6 If Prospect Medical has no claim, then that complaint
7 lacks merit.

8 And, your Honor, one point that's been obscured and
9 not, I should say, addressed is CCCB is suing Prospect
10 Medical on the guarantee. The guarantee has a forum
11 selection clause. The forum selection clause in the
12 guarantee is exclusively Rhode Island. If I may, your
13 Honor, I'm going to hand up the guarantee, and I've
14 highlighted the entry on Page 3.

15 So Page 3 states that the guarantor submits to the
16 jurisdictional courts in Rhode Island that all actions
17 arising out of this guarantee shall be tried and
18 litigated only in the state court located in Providence
19 County. So in that Delaware complaint we have the
20 guarantor suing CCCB, notwithstanding it has a forum
21 selection clause that the guarantor's obligations can
22 only been litigated in Rhode Island. What a cluster of
23 issues and craziness is going to arise if the Delaware
24 Court gets involved and these venue-selection clauses are
25 litigated there and here, as they would have to be if

1 that's permitted.

2 But, your Honor, if in December they come back, and
3 they present an argument as to why it makes sense to
4 allow them to do it, so be it. But right now, your
5 Honor, they haven't made a case that the forum selection
6 clause somehow dictates that result.

7 Your Honor, I made a star in my notes of when
8 Mr. Halperin in response to your question in addressing
9 the indemnity issue said that the prejudice on the
10 indemnity issue is that if the settlement is allowed to
11 go through, CCCB's assets will be distributed to the
12 receiver, and Prospect wants those assets.

13 So, basically, the receiver is being asked to
14 litigate in Delaware to enable Prospect to get assets
15 that are covered by a settlement that's currently under
16 consideration by the federal court in Rhode Island. Talk
17 about forum shopping. Talk about an interference with
18 the proceedings in the federal court.

19 My brother suggested the lawsuit CCCB filed was
20 motivated by tactics. That lawsuit seeks information
21 that had been requested in writing on five separate
22 occasions that is needed to evaluate to exercise or not
23 exercise the put. That lawsuit had to be brought, and
24 the only reason it wasn't brought sooner was because the
25 parties were attempting to negotiate an agreement whereby

1 that information would be provided. And once the
2 standstill agreement was entered into, it was appropriate
3 to proceed.

4 Your Honor, if I may just consult with Mr. Wistow?

5 THE COURT: Yes.

6 (Pause)

7 THE COURT: Counsel, actually, what I'm going to do
8 -- unless you're just finishing up, what I'm going to do
9 at this point, all of you have been listening, and the
10 court reporter has been taking all of this down for an
11 hour and half now. So we're going to take a brief
12 10-minute break so she can stop typing, and we'll return
13 to you if you have anything further, and then I'll hear
14 from your brother counsel.

15 The Court is in recess.

16 THE SHERIFF: Please rise.

17 (Brief recess)

18 THE COURT: You may continue.

19 MR. SHEEHAN: Okay, your Honor, and I will be brief.

20 Your Honor, the first point is, your Honor asked
21 about whether the standstill agreement applies to the
22 administrative proceeding, and the last paragraph of it,
23 which by the way is Court ordered, paragraph 5, arguably
24 suggests that it does. It's not clear, but it suggests
25 to me that it does, which only means, of course, that

1 those proceedings can't be brought within the next eight
2 months either. So they're suffering no injury from not
3 being able to have relief from the stay because they
4 can't bring those proceedings anyway.

5 That same paragraph, your Honor, however has an
6 exception which says they can now today assert as
7 counterclaims or cross-claims in the federal court action
8 whatever they'd like. They have chosen to proceed by
9 motion to dismiss and to delay filing their answers. But
10 that was their choice, and they have the right to do that
11 under the standstill agreement.

12 The third point, your Honor, is on specific
13 performance, CharterCare Community Board, CCCB is seeking
14 specific performance of the 50 million dollar capital
15 commitment so that the put option can reflect the value
16 of that commitment.

17 Also, your Honor, so that Prospect CharterCare and
18 the hospitals are complying with their tax treaties with
19 the Town of North Providence and Providence under which
20 30, 40, 50 million dollars of taxes have been forgiven by
21 those cities on the basis of this promise to invest
22 50 million dollars in the hospital, and if that's not
23 done, the hospital is going to be sued, and that's going
24 to happen sooner than later.

25 Finally, your Honor, and this is a two-part

1 "finally," not only does the guarantee to which Prospect
2 Medical is not a party proceeding in the Rhode Island
3 forum selection clause, and Prospect Medical is not a
4 party to the LLC agreement, it also has no right to
5 enforce the forum selection clauses in the LLC agreement.

6 And I said finally, your Honor, but there is one
7 more point. The settlement in the federal court is now
8 becoming more and more delayed, and it may well be that
9 the put option will have to be exercised before that
10 settlement is finally approved. In that case CCCB is no
11 longer a shareholder in the hospitals, and Prospect's
12 Delaware complaint goes away for another reason. It's
13 now the 100 percent owner of those hospitals, having paid
14 off CCCB. Another reason why it's premature for them to
15 proceed in any other forum.

16 Thank you, your Honor.

17 THE COURT: Thank you. Next.

18 MR. SHEEHAN: Your Honor, if I may, Mr. Land for KR
19 CCCB, this is so interweaves with that action has very
20 brief points to make if it Court would permit.

21 THE COURT: Why don't I hear from counsel first.

22 MR. SHEEHAN: Thank you.

23 MR. RUSSO: Your Honor, I just want to make a couple
24 of points on the administrative or the regulatory issues.
25 First, my brother made a point about not understanding

1 conversion. And what the conversion statute very clearly
2 says is that a conversion means, one, any transfer by a
3 persons or persons of and ownership or membership
4 interest in a hospital, any transfer of the authority in
5 a hospital, or any transfer of the assets in a hospital.
6 And authority is defined in that section as voting
7 authority. So that's what we're focused on. Voting
8 authority was in the Prospect CharterCare Board. That's
9 how the conversion was approved.

10 The second point I wanted to make, it's been said at
11 least three times in argument that the Attorney General
12 ruled on the petition. They did not rule. The Court,
13 your Honor, gave us the opportunity to withdraw it. We
14 withdrew it. So that has not been ruled upon. If the
15 receiver was instructed to ask the regulatory agencies to
16 rule whether this is a conversion, it wouldn't be a
17 reconsideration. I think that's important.

18 The third point is, and I know we've batted this
19 back and forth, but what the settlement agreement -- I
20 mean the stipulation and consent order, or so-called
21 standstill says at the very last Page 3: That the
22 Prospect Entities shall upon leave of Court in the
23 receivership action be free to file and pursue
24 administrative proceedings related to the hospitals
25 arising out of the federal court approval of the

1 receiver's settlement agreement with CCCB.

2 So what was envisioned if the federal court approves
3 it, assuming this Court gave us leave -- obviously, if
4 you did, you would have to condition that leave to await
5 for the federal court to approve it, but at that time we
6 would be able to petition the administrative agencies or,
7 again, the Court to instruct the receiver to do so.

8 THE COURT: Thank you very much.

9 MR. HALPERIN: Your Honor, I'd like to hand up a
10 copy of the LLC agreement. I know your Honor has a copy,
11 but you may not have what is the final version.

12 THE COURT: That will be fine. Thank you.

13 MR. HALPERIN: This isn't going to take long, your
14 Honor. I'm listening to all of the reasons why the Court
15 should not permit Prospect to exercise its rights, and
16 I'm struck by the fact that all of this is put in motion
17 by the manner in which the receiver chose to draft the
18 settlement agreement with CCCB. That agreement could
19 have been drafted many different ways to avoid all of
20 these issues, but they chose to do it the way they chose
21 to do it. It reminds me of the collusion argument that
22 was made with Judge Smith. He said, Why did you put all
23 those provisions in there? If you didn't put them in
24 there, we wouldn't be having this argument.

25 Well, the same applies here. Why did they put all

1 those provisions in? We told them at the time of the
2 hearing all these provisions are going to lead to
3 litigation. There are many ways to draft that agreement
4 around it, and now they're complaining that, the language
5 they drafted, we should be prevented from pursuing our
6 rights even if there's a transfer that violates the LLC
7 agreement.

8 They brought it on themselves. They filed all of
9 this lawsuit. My client has essentially been the
10 punching bag for the receiver in multiple venues, and
11 it's trying to find the venue to simply pursue its
12 rights, and it's attempting to follow the rights it has
13 under the LLC agreement.

14 I would note that the LLC agreement, and when you
15 look at that, your Honor, there are a number of
16 provisions in there that deal with locations for dispute
17 resolution. Interesting that in both the mediation and
18 arbitration provisions, they're also on Page 38,
19 Section 17, they say that the mediator candidates, the
20 arbitrator candidates, none of whom work or reside in
21 Rhode Island or California or any contiguous state,
22 there's clearly an effort being made by this out-of-state
23 entity to avoid being in Rhode Island where they are
24 apparently of the view that perhaps they maybe may not
25 get a completely impartial hearing. I'm not suggesting

1 that's true in any way, shape, or form, but a reason why
2 both parties are saying: It won't be California, it
3 won't be Rhode Island.

4 So now they negotiate these provisions and come to
5 resolution for litigation. If you need immediate relief,
6 you can go to Rhode Island. Anything else goes to
7 Delaware. That's the agreement between the parties.

8 My brother's reading of Section 17.5 in the specific
9 performance I think is a very strained reading.

10 Interpreting the language that says: Accordingly, in
11 addition to any other right and remedy to which the
12 non-breaching party may be entitled, they shall be
13 entitled to specific performance in Rhode Island.

14 Specific performance is certainly in addition to any
15 other remedy, but it doesn't say that they can bring all
16 these other remedies because they're bringing a specific
17 performance claim. It's simply an interpretation that my
18 brother is making. If the clause is ambiguous, it will
19 require a court to go through the typical manner of how
20 one interprets an ambiguous clause, and there may need to
21 be evidence on that issue. But, again, that is not
22 before this Court.

23 I also point out the words "non-breaching party,"
24 which hasn't been focused on in 17.5, the non-breaching
25 party who can speak the specific performance, the

1 equitable relief. Here, we assert, Prospect, that CCCB
2 is the breaching party. That in and of itself might
3 nullify their ability to pursue specific performance here
4 in Rhode Island.

5 THE COURT: But it's more than specific performance.
6 Also, in your agreement, and, again, I'm looking at I
7 guess an old version, and I'm not sure if it's the same,
8 but the Court gives no weight whatsoever to what the
9 headings say.

10 MR. HALPERIN: What the headings say? I don't see
11 language in here --

12 THE COURT: I'm just saying, so I should be looking
13 at the words "specific performance."

14 MR. HALPERIN: No. I totally agree with you, your
15 Honor, about the language. But it talks about specific
16 performance and injunctive relief. Those are the only
17 things that can be obtained through that paragraph. And
18 if you look at the very last two lines, it's for a
19 particular purpose. Specific performance, injunctive
20 relief to prevent breaches or threatened breaches.
21 Prevent.

22 They're asserting a demand for documents, and
23 they're saying, You've already breached. You have failed
24 to produce documents. Now produce them. And that's a
25 reading of the language very literally, but, in any

1 event, who is the breaching party here to begin with?

2 Lastly, your Honor, it's a complete misstatement to
3 say that the Prospect Entities are seeking all of the
4 assets of CCCB. To the extent the indemnification is
5 pursued, the indemnification claim is valued at whatever
6 the court determines it's valued at. If it's just legal
7 fees, it's legal fees. If it's to pay damages, they have
8 to pay damages.

9 But let's keep in mind that nothing has been proven
10 against Prospect for any liability whatsoever. And if we
11 go back, this is a company that came into the state to
12 save a failing hospital, is being sued for a pension plan
13 which explicitly it disavowed any responsibility for. A
14 possible outcome, if not a likely outcome, is it has no
15 liability, and it has the right to obtain indemnification
16 from CCCB and the other contracting parties. That right
17 will be lost should all of the assets be transferred, but
18 it certainly doesn't mean we're seeking all of the
19 assets.

20 Lastly, final point. My brother misspoke when he
21 said that they filed the CCCB lawsuit once the standstill
22 was ended. Clearly, it was once the motion for leave was
23 about to be heard in March.

24 Thank you.

25 THE COURT: Thank you very much. Attorney Land.

1 MR. LAND: Thank you, your Honor, I'll be very
2 brief. Starting off, I join in Mr. Sheehan's and the
3 receiver's arguments relative to the legal issues that
4 have been set forth. And I really only have three
5 points, your Honor.

6 To the extent that this Court considers this matter
7 comes down against from the receiver here and determines
8 relief is appropriate in some manner, we want to be clear
9 that we want to reserve our rights to move to dismiss any
10 matter, any claims brought in the Delaware lawsuit,
11 should that occur.

12 Secondly, the notion that in some way my client is
13 being controlled by the receiver is entirely without
14 merit. We have an independent -- my client has an
15 independent obligation to pursue the claims against
16 Prospect. Bringing this lawsuit in Rhode Island was the
17 appropriate venue and the appropriate process. And,
18 frankly, had my client not chosen to do that, there would
19 be an issue as to whether or not they were properly
20 performing and enforcing their rights under the relevant
21 agreement, and, specifically, relevant to obtaining the
22 maximum amount of value for the 15 percent interest
23 ultimately through the valuation process. And I think
24 that, should the Court consider it, the allegations set
25 forth in that complaint are clear that we're seeking to

1 enforce rights that are appropriate to be enforced in
2 Rhode Island.

3 And just on Mr. Halperin's point about the breaching
4 party, perhaps it's premature to make that determination
5 at all, but I think the facts are clear that information
6 was requested and refused. So just looking at those two
7 basic facts relative to who's the breaching party, I
8 think it's clear that our client had at the very least a
9 very colorable claim to bring in Rhode Island relative to
10 that.

11 Lastly, your Honor, Mr. Sheehan pointed this out,
12 but I think it's very important for the Court to consider
13 the significant additional expense to CCCB that will
14 ultimately fall on the pension holders. Everything
15 that's going on in this case, whether it's federal court
16 or here, that requires additional efforts by the
17 receiver, the receiver's counsel, CCCB, St. Joe's, Roger
18 Williams are all Prospect, ultimately, are flowing down
19 to the beneficiaries.

20 I don't think it's a secret here, your Honor, the
21 settlement agreement that my client entered into with the
22 receiver is intended to maximize the value of the assets
23 for the benefit of those parties. And, so, I would just
24 suggest, your Honor, to allow Prospect to go forward in
25 Delaware is an unnecessary cost that will be again

1 leveled on the very parties that have suffered the most
2 in this case.

3 And with that, your Honor, I will take my leave.
4 Thank you.

5 THE COURT: Before we close the record, does any
6 party have any statements they would like to add?

7 MR. SHEEHAN: May I, your Honor?

8 THE COURT: Go ahead.

9 MR. SHEEHAN: Your Honor, limiting my remarks, of
10 course, to what's just been said, dealing first with
11 Mr. Russo's comments on voting control. As he pointed
12 out, the issue is the voting control that Prospect
13 CharterCare has over the hospitals. Nothing in the
14 settlement agreement affects that voting control. It's
15 going to be a hundred percent before and a hundred
16 percent after. It's the shareholders of Prospect
17 CharterCare's voting control that is being affected.

18 Mr. Russo said the AG did not rule on their
19 petition. They filed a pleading with this Court, the AG
20 did today, and as a matter of information that pleading
21 is improper before the AG. This is not an APA
22 proceeding.

23 Then the suggestion from Mr. Halperin that the
24 receiver put this in motion, and the receiver, therefore,
25 is responsible for what happened. Should the receiver

1 have taken less money? Should the receiver have left
2 assets with CCCB to satisfy Prospect?

3 The law -- and these cases are in our memo -- is
4 clear that the receivership stay applies not only to
5 claims against the receiver, but to claims against
6 parties with whom the receiver has settled. We cited
7 those cases to your Honor, and that's exactly what we
8 have here.

9 The mediation point that Mr. Halperin brought up, he
10 left out that the parties stipulated that mediation and
11 arbitration will be in Rhode Island.

12 The point that Prospect does not want all of the
13 assets of CCCB, they certainly do if they can get a claim
14 big enough to get them, and he acknowledged that. He
15 just said he hasn't liquidated his claim yet.

16 Finally, the notion that Prospect came here to help
17 a failing hospital. The Court ultimately will have to
18 determine, but it's plaintiff's allegation that Prospect
19 came here in a sweetheart deal in exchange for blocking,
20 eliminating the pension liability.

21 Thank you, your Honor.

22 THE COURT: Thank you. Counsel, thank you very much
23 for your arguments. Just a couple of things. Attorney
24 Halperin, if you could show the -- I don't know if
25 counsel has seen the final documents.

1 MR. HALPERIN: I gave them a copy.

2 THE COURT: Any objection to entering it as an
3 exhibit?

4 MR. SHEEHAN: No, your Honor. I confirmed that it
5 corresponds with the language in that document.

6 THE COURT: To the clerk, if you could mark that as
7 Court's 1.

8 (COURT'S EXHIBIT 1 MARKED FULL)

9 THE COURT: The Court has a lot of papers, heard a
10 lot of argument today. I'll reserve decision.

11 Thank you all very much for your arguments. The
12 Court will be in recess.

13 THE SHERIFF: Please rise.

14 (The proceedings concluded at 12:27 p.m.)
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