STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND

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

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

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON OCTOBER 10, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE..............THE RECEIVER
MAX WISTOW, ESQUIRE.....................SPECIAL COUNSEL
STEPHEN SHEEHAN, ESQUIRE................FOR THE RECEIVER
BENJAMIN LEDSHAM, ESQUIRE...............FOR THE RECEIVER
SCOTT BIELECKI, ESQUIRE.................FOR CHARTERCARE
ANDREW DENNINGTON, ESQUIRE..............FOR CHARTERCARE
RUSSELL CONN, ESQUIRE...................FOR CHARTERCARE
ROBERT FINE, ESQUIRE....................FOR CHARTERCARE
LYNNE DOLAN, ESQUIRE....................FOR CHARTERCARE
PRESTON HALPERIN, ESQUIRE...........FOR PROSPECT MEDICAL
JOSEPH CAVANAGH, ESQUIRE............FOR PROSPECT MEDICAL
DEAN WAGNER, ESQUIRE................FOR PROSPECT MEDICAL
EDWAN RHOW, ESQUIRE.................FOR PROSPECT MEDICAL
CHRISTINE DIETER, ESQUIRE...........FOR R.I. FOUNDATION
LAUREN ZURIER....ESQUIRE........ATTORNEY GENERAL'S OFFICE
MARIA LENZ, ESQUIRE.............ATTORNEY GENERAL'S OFFICE
DAVID MARZILLI, ESQUIRE.........ATTORNEY GENERAL'S OFFICE
ARLENE VIOLET, ESQUIRE...............FOR THE PENSIONERS
ROBERT SENVILLE, ESQUIRE.............FOR THE PENSIONERS
CHRISTOPHER CALLACI, ESQUIRE.........FOR U.N.A.P.
STEVEN BOYAJIAN, ESQUIRE.............FOR ANGELL PENSION

GINA GIANFRANCESCO GOMES
COURT REPORTER

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

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 108, inclusive, are a true and accurate transcript of my stenographic notes.

GINA GIANFRANCESCO GOMES
COURT REPORTER

1 **WEDNESDAY, OCTOBER 10, 2018**

2 **MORNING SESSION**

3 THE COURT: Good morning. Madam Clerk, I would ask
4 that you please call the case.
5 THE CLERK: Your Honor, the matter before the Court
6 is PC-2017-3856, St. Joseph's Health Services of Rhode
7 Island v. St. Joseph's Health Services of Rhode Island
8 Retirement Plan. This matter is on for the Receiver's
9 Petition for Settlement Instructions. Would counsel
10 please identify themselves for the record.
11 MR. DEL SESTO: Good morning, your Honor, Stephen
12 Del Sesto, Court-Appointed Receiver.
13 MR. WISTOW: Max Wistow, counsel to the Receiver.
14 MR. SHEEHAN: Good morning, your Honor. Stephen
15 Sheehan, also counsel for the Receiver.
16 MR. BIELECKI: Good morning, your Honor. Scott
17 Bielecki for CharterCare Foundation.
18 MR. DENNINGTON: Andrew Dennington for CharterCare
19 Foundation.
20 MR. CONN: Russell Conn, CharterCare Foundation.
21 MR. HALPERIN: Preston Halperin for Prospect Medical
22 East and Prospect Medical Holdings.
23 MR. CAVANAGH: Joseph Cavanagh for Prospect
24 CharterCare, LLC, Prospect CharterCare SJHSRI, LLC,
25 Prospect CharterCare RWMC.

1 MR. WAGNER: Dean Wagner on behalf of Prospect
2 Holdings and Prospect East.
3 MS. DIETER: Christine Dieter on behalf of the
4 interested non-party Rhode Island Foundation.
5 MS. ZURIER: Lauren Zurier on behalf of the Attorney
6 General.
7 MS. LENZ: Maria Lenz also on behalf of the Office
8 of Attorney General Interested Parties.
9 MR. LEDSHAM: Benjamin Ledsham on behalf of the
10 Receiver.
11 MS. VIOLET: Arlene Violet on behalf of some 357
12 elderly participants.
13 MR. CALLACI: Chris Callaci on behalf of 400
14 participants in the UNAP, your Honor.
15 MR. FINE: Robert Fine for CharterCare Community
16 Board, St. Joseph's Health Services of Rhode Island, and
17 Roger Williams Hospital.
18 MR. BOYAJIAN: Steve Boyajian for the Angell Pension
19 Group.
20 THE COURT: Okay. I would also just ask, although
21 they may not be appearing for the proceeding before me,
22 if there is any attorney that has entered in either the
23 State or federal proceeding that has not identified
24 themselves.
25 MR. MARZILLI: David Marzilli on behalf of the

1 Attorney General.
2 MR. HALPERIN: Your Honor, with me is Ekwan Rhow.
3 We filed a motion for pro hac vice admission and that's
4 probably just coming across your desk.
5 MR. SHEEHAN: No objection, your Honor.
6 MR. SENVILLE: Robert Senville, co-counsel to Arlene
7 Violet on behalf of the pensioners.
8 THE COURT: Thank you.
9 MS. DOLAN: Lynne Dolan on behalf of CharterCare,
10 LLC.
11 MR. BREQUET: Your Honor, Mr. Kasle asked me to say
12 he has a conflict today.
13 THE COURT: Thank you very much. Before we get
14 started, I am going to request if anyone is going to
15 address the Court, address the Court from the lectern.
16 This way we make sure our court reporter can get a clear
17 record, and we will proceed forward in a moment with the
18 petition of the Receiver. The Court has had the
19 opportunity to review the extensive papers, objections,
20 and replies filed by a number of parties in this case,
21 but in order to limit some of this today, I would just
22 like to ask a question that I believe from CharterCare
23 Foundation it was in their brief whether any of the
24 objecting Defendants have an objection to this Court
25 approving the distribution of what was termed the initial

1 lump sum settlement, which is the $11,150,000 and the DOT
2 escrow is less than $600,000. I just wanted to kind of
3 start with that point so I have an understanding in terms
4 of what is in dispute here.
5 MR. DENNINGTON: Your Honor, Andrew Dennington for
6 CharterCare Foundation. No, and I think that we would be
7 in a very different posture if that was the only
8 interpreting sum.
9 THE COURT: The other objecting party was Prospect.
10 MR. HALPERIN: The Prospect entities do not object
11 to that, your Honor.
12 THE COURT: And, again, I'm not reaching standing
13 but I just want to know. The other objection was filed
14 by the Attorney General's Office.
15 MS. ZURIER: We have no objection to the
16 distribution of that asset, your Honor.
17 THE COURT: Okay. And I would assume the filings on
18 behalf of the planned participants by Attorney Kasle,
19 Attorney Violet, and, I believe, Attorney Callaci, you
20 certainly don't have an objection.
21 MS. VIOLET: That is correct, your Honor. We have
22 no objection.
23 MR. CALLACI: No objection, your Honor.
24 THE COURT: With that, I am going to ask the
25 Receiver to proceed in a moment. I do want to indicate

1 to the parties after reading the papers there are certain
2 issues the Court is particularly interested in, and the
3 first is the standard that this Court should be applying
4 in this case and if it is the Jeffrey's factors of the
5 First Circuit, which Judge Silverstein had written about
6 or another, what the underlying position is in terms of
7 the factors, if any, that they either met or not met.
8 The second is, and this is really for the Receiver,
9 what exactly is the Receiver asking the Court to approve?
10 From reading the papers is it an approach that may be
11 potentially litigated in certain steps along the way or
12 to have this Court approve the settlement as a matter of
13 law that the Receiver can proceed with all of those
14 steps? And a subset to that is if it is just an
15 approach, in what form and by what method? If someone
16 contests something that they have standing for, where
17 they envision that that would be heard.
18 The next issue does deal with standing is who, if
19 any, of the objecting parties have standing to object to
20 the proposed settlement. I saw two very different
21 approaches from the Receiver and then CharterCare and one
22 dealing with some of our Supreme Court case law of the
23 standing inquiry, and then there was also advanced by
24 CharterCare the party of interest under 11-1-9(b) of the
25 bankruptcy code, which should be applied, or whether both

1 should be applied.
2 And then the final, and this really goes more
3 towards the Prospect entities, is where the determination
4 should be made in accordance with 23-27.14-35, known as
5 the Court Approved Settlements, whether that
6 determination should be made here or in the Federal Court
7 litigation proceeding.
8 So that being said, I'm certainly going to allow,
9 this is an important matter, all sides to take the
10 appropriate time to go through whatever they want to
11 reference in their papers. Counsel for the Receiver may
12 proceed.
13 MR. DEL SESTO: Good morning, your Honor, Steven
14 Del Sesto, the Receiver for the plan. Your Honor, I am
15 going to be deferring time to Special Counsel for
16 argument. Obviously, if your Honor has any questions, I
17 am here to answer those and I reserve some time to
18 respond, if I believe it's appropriate.
19 At the beginning of this hearing, your Honor, I want
20 to just kind of cut to the conclusion, which is in my
21 opinion the settlement is in the best interest of this
22 plan, in the best interest of the participants. And,
23 quite frankly, your Honor, to somewhat address the
24 question your Honor asked of the parties a few minutes
25 ago, even if the settlement did not include the

1 assignments that are included as part of that settlement,
2 the infusion of $12 million in and of itself would
3 warrant recommendation of the settlement. We have
4 identified to the Court the difficulties and the problems
5 associated with those assignments. We're well aware of
6 them. We made the Court well aware of them. Even if we
7 either choose not to pursue them or failed in our
8 pursuit, the infusion of $12 million into this plan, I
9 don't believe anybody in this room could argue that that
10 is not in the best interest of the plan.
11 I just wanted to begin the hearing that way and
12 advise the Court of my opinion as the Receiver after
13 months of negotiations which resulted in the settlement
14 that is before your Honor this morning.
15 THE COURT: Thank you. Why don't we turn it over to
16 Special Counsel.
17 MR. WISTOW: Good morning, your Honor.
18 THE COURT: Good morning.
19 MR. WISTOW: And good morning to the other your
20 Honor.
21 THE COURT: I apologize. Chief Judge Smith of the
22 Federal Court is here with us as well today to observe.
23 MR. WISTOW: I've got to be on my toes to make sure
24 I don't say something here and something else later in
25 the Federal Court. The first thing I do want to clarify

1 before I get into the proposed procedure I would ask the
2 Court to follow, when the Receiver says that he believes
3 that the settlement, if it ultimately ended up as only
4 $12 million would still be beneficial to the estate, we
5 hardly agree with that. I believe, and it should be made
6 clear, that what he's saying is the assignments of the
7 various plans are valuable and would be a better result.
8 If those are shot down later, we would still end up with
9 a settlement that was okay, but we do want to pursue the
10 assigned plans.
11 Having said that, your Honor, there is really two
12 aspects to how we can address this. The procedure is not
13 entirely clear in my mind I'm going to propose under,
14 that is, to discuss first the general and overarching
15 issues of standing, injury, what Court should address
16 these various problems. And Mr. Sheehan is prepared to
17 address that at length. I would propose that after that
18 presentation that the Defendants respond on that issue
19 and also set forth with specificity some of the arguments
20 they are making on the merits. For example, Prospect
21 CharterCare is saying that the settlement should not be
22 approved because this would represent an illegal transfer
23 of the 15 percent ownership interest in Prospect
24 CharterCare, LLC. We are prepared to address that on the
25 merits to show the Court that we believe as a matter of

1 law it is an appropriate assignment for reasons we could
2 get into. However, our principle feeling is that those
3 issues, who is right, who is wrong, really should be put
4 off for another day, either before the Federal Court or
5 perhaps even the Federal Court saying you're going to get
6 these assignments as part of the settlement. Go try to
7 enforce them in an appropriate form. That remains up in
8 the air. But that is my proposal as I proceed this
9 morning, and it would give us a good deal of guidance if
10 you can tell us whether or not that methodology makes
11 sense.
12 THE COURT: I'll allow you to take the issues that
13 you want. That being said, even if the Court feels it
14 can decide, for example, the standing issue as a matter
15 of law, I am still going to allow them to make a record.
16 But, certainly, I think how we can be best served before
17 we even get to the standing and the objections is take us
18 through the settlement and, as I said, what the
19 settlement does or it doesn't do and why it's in the best
20 interest of the estate.
21 MR. WISTOW: I'm going to defer to Mr. Sheehan. I
22 was going to begin to speak, but when he jumped up, he
23 sent me the signal.
24 THE COURT: Attorney Sheehan, please proceed.
25 MR. SHEEHAN: Good morning, your Honor.

1 THE COURT: Good morning.
2 MR. SHEEHAN: Mr. Wistow and I have a division of
3 labor. I am going to address five points. The five
4 points I'm going to address are first the standard
5 applicable to the Court's review. Second, I'm going to
6 explain what the settlement does. Third, I'm going to
7 address why and how it's fair and reasonable to the
8 receivership estate. Fourth, I'm going to address the
9 argument that somehow the Receiver lacks authority, and
10 the argument that the settlement is unlawful or
11 collusive. Fifth, I'm going to address the point that
12 the objecting parties lack standing.
13 Now, Mr. Wistow is going to go off on the fifth
14 point and essentially proceed on the assumption that they
15 do have standing and is going to address all of the
16 merits. We're not going to overlap to the extent we can
17 avoid it, your Honor. I apologize if any of that does
18 occur.
19 The legal standard, as we pointed out in our
20 memorandum, your Honor, there is no authority we're aware
21 of that addresses the legal standard in the context of
22 the settlement approvals by one court authorizing a
23 Receiver to go to another court for settlement approval.
24 So, your Honor, it really comes down to basic juris
25 prudence between state court receivership proceedings and

1 Federal Court. We have cited your Honor to a District
2 Court case, which in turn cites to a U.S. Supreme Court
3 case in Princess -- something, something, something v.
4 Something -- Lida of Thurn and Laxis v. Thompson, I
5 believe it is. In any case, what they say as a matter of
6 general law is that if a state court receivership is in
7 existence and a particular asset has value to the
8 receivership estate and the rights to that asset then are
9 sought to be litigated in Federal Court, that the Federal
10 Court will show deference to the state court that had
11 initial jurisdiction over the property.
12 In this case, your Honor, obviously the Federal
13 Court cannot completely abstain from addressing the
14 issues because the case in Federal Court is a class
15 action. Only the Federal Court on that class action can
16 issue an approval. So what we have is what they call in
17 conflicts of law, a decoupage. You have to cut it up a
18 little bit. And what we propose, your Honor, the best
19 way to cut it up and the one that causes no prejudice is
20 that your Honor address whether the settlement is fair
21 and reasonable in the interest of the receivership estate
22 and stop there.
23 And the next step would be the Receiver, if your
24 Honor approves the settlement, would go to Federal Court.
25 In Federal Court the issues will be: First, is the

1 settlement appropriate as a settlement of a class action
2 under the federal rules? Second, is the settlement a
3 good faith settlement so as to trigger the benefits to
4 both the Receiver and the settling Defendants of the
5 special statute? And what those benefits are, your
6 Honor, is that with respect to the Receiver the benefit
7 is that it limits the non-settling parties to a credit
8 based upon the amount paid by the settling party, which
9 happens to be the majority rule in the United States, but
10 in Rhode Island it's not the common rule. That's why a
11 statute had to be past and the benefit to the settling
12 Defendants is that it precludes contribution claims
13 against them. So we explained a little bit further in
14 our memorandum, your Honor, the perils of your Honor
15 deciding issues and then our having to go to Federal
16 Court and argue whether it encompasses what it
17 encompasses exactly. This seems to be the cleanest way
18 to proceed.
19 Now, with respect to the first point, is the
20 settlement fair and reasonable for the legal standard,
21 putting aside this issue in different courts, if we are
22 going to proceed on the assumption that at least this
23 Court is going to look at whether it's in the best
24 interest of the receivership estate, the first point I
25 would like to make is the Court is not being asked to

1 substitute the Court's judgment for the Receiver. And
2 Judge Silverstein's case says that there are a lot of
3 cases that say that. Judge Silverstein states that the
4 court gives deference to the prudent business judgment of
5 the Receiver. Now, the Receiver and Special Counsel have
6 devoted thousands of hours to this case and for courts in
7 receivership proceedings to function, judges can't spend
8 thousands of hours on a particular case. So there is a
9 benefit for the Court giving deference for the Receiver
10 in terms of the administration of the receivership
11 estate.
12 The next point I would like to make is the issue is
13 whether the settlement as a whole is fair and reasonable.
14 It's not whether each provision in the settlement itself
15 is necessary or is required for the settlement to be fair
16 and reasonable. It's whether the package that is
17 presented as a whole is fair and reasonable. And there
18 is a case I cited, your Honor, from the bankruptcy court
19 in the Eastern District of Pennsylvania, In Re: Edwards,
20 228 B.R. 552, and there the Court said -- this is in the
21 context of the bankruptcy, your Honor, where a Court has
22 to approve a trustee settlement as your Honor has to
23 approve a receiver settlement. There the Court said,
24 "The Court's role is not to conduct a trial or a
25 mini-trial, or to decide the merits of individual issues.

1 Rather, it is to determine whether the settlement as a
2 whole is fair and equitable."
3 The next point, your Honor, is what is the
4 settlement about? What are the elements of it?
5 THE COURT: Counsel, before you get to that, and I
6 understand what you're saying about the general rule is
7 the best interest. You addressed a little bit some of
8 these prongs. If the Court was to say we're going to at
9 least look for advisement for the Jeffrey's factors, can
10 you just address that probability of success?
11 MR. SHEEHAN: Yes, your Honor. I intended to pick
12 that up when I got to why this particular settlement is
13 fair and reasonable.
14 THE COURT: If you're going to -- I just want to
15 make sure you touch on it at some point.
16 MR. SHEEHAN: I am going to ask the Court to apply
17 the standards that Judge Silverstein adopted from the
18 First Circuit. The settlement involves primarily four
19 asset recoveries. The first is cash, and there is a
20 minimum, a base, in the settlement agreement for the cash
21 that would be due upon the effective date of the
22 settlement, which is, I believe, five days after the
23 Federal Court approves the settlement, assuming the
24 Federal Court approves the settlement. Now, that base is
25 actually higher at this point. We heard from counsel for

1 the settling Defendants that he has additional cash.
2 That number is close to $12 million at this point and may
3 be in excess of that. And it is also more than 95
4 percent of the settling Defendants' operating funds.
5 THE COURT: So that sum does not include DLT?
6 MR. SHEEHAN: It at this point does not include the
7 remaining 750 on the DLT. Mr. Land obtained a payment
8 from some other source but that has not been released
9 yet, your Honor. That 750 is still out there. But it's
10 over 95 percent of the operating funds and that is
11 important to evaluate the fairness of the settlement
12 showing what is actually given up as a percentage of what
13 could be obtained. We're getting well over 95 percent of
14 their cash.
15 Now, the second element or aspect of the settlement
16 is the assignment of CharterCare Community Board's right
17 and Prospect CharterCare, and I call that CCCB or
18 Community Board. And in the initial transaction
19 Community Board received a 15 percent interest and
20 Prospect CharterCare, LLC, that's the holding company
21 that owns the two entities that have the licenses to run
22 the hospital. In essence, the Community Board owns 15
23 percent of the two hospitals at that time in 2014. Now,
24 in 2014 Prospect CharterCare valued that interest in its
25 books at $15.9 million and it was a component and I don't

1 need to now go into what those components were, your
2 Honor, because it is what it is. We know no reason today
3 that number would have changed. On the other hand, we
4 don't have access to the internal accounting financials
5 that would answer the question what that present value is
6 today. To some extent the value of that interest cannot
7 be determined for purposes of this petition for
8 settlement instructions.
9 Now, there is also the issue of restrictions on the
10 Community Board's rights to sell that asset and Mr.
11 Wistow is going to discuss that on the merits. But one
12 point that needs to be addressed in this context of
13 explaining what the settlement does is to point out the
14 put option. There is an undertaking in the settlement
15 agreement that Community Board on the effective date,
16 which is June of 2019, five years from June of 2014, so
17 about seven months from now we'll exercise the put option
18 and essentially call upon its co-limited liability
19 company or what we'd like to call joint venturer Prospect
20 East to buy them out.
21 Now, one very important feature of this asset, your
22 Honor, unlike what I'm about to discuss concerning the
23 CharterCare Foundation is that if this settlement
24 proceeds, the Receiver will be entitled -- the Receiver's
25 right to collect on that asset is not dependent upon the

1 issues being litigated in the Federal Court. In other
2 words, it doesn't matter whether there were fraudulent
3 conveyances, et cetera, et cetera, et cetera, as alleged
4 in the 23 counts in the current amended complaint in the
5 Federal Court. It's a straight outright tried and
6 transfer of a property, and so that gives a little more
7 potential likelihood of recovery because we don't have to
8 then go into Federal Court to prove our rights. There
9 are problems that Mr. Wistow will address and Prospect
10 CharterCare will address as to whether we get there in
11 the first place, but I don't think anybody is going to
12 say that our right to enforce is dependent on proving
13 fraud. In other words, we could lose the entire Federal
14 Court action and still get that asset.
15 The third asset in the settlement is the assignment
16 of CharterCare Community Board, that is to say Community
17 Board's interest in CC Foundation. Those also are
18 difficult to value. At of the end of last year they had
19 assets of over $8.7 million. They are charitable assets
20 and the Receiver cannot and does not intend to simply
21 take the charitable assets. What the Receiver does
22 intend to do and has the right to do, and let me say has
23 the present intent to do, reserving the right to
24 essentially change his mind. Just so the Court knows,
25 the direction the Receiver is proceeding, what the

1 Receiver is contemplating is if he's asserting his rights
2 as the sole member in the Foundation, and Mr. Wistow is
3 going to discuss the merits of that claim, but asserting
4 his rights as the sole member of the Foundation to put
5 the Foundation into judicial liquidation. That is an
6 expressed provision in the bylaws and the judicial
7 liquidation statute has a predicate for that. A member
8 may put an entity into liquidation on a showing that the
9 acts of the directors or those in control of the
10 corporation are illegal, oppressive, or fraudulent. So
11 here we're tying into the merits of the Federal Court
12 case on that one, and our argument will be they have no
13 authority. And then there's a straight outright to
14 simply have a dissolution continue under the supervision
15 of the Court. So it may be we'll be entitled to proceed
16 with liquidation without having to show fraud.
17 Now, the procedure in liquidation we have gone to in
18 many contexts, your Honor. We take the position, once
19 again, that there is a list of priorities of payments.
20 First, in the case of judicial liquidation there is
21 administrative expenses and payment to creditors. So
22 that is how we will make that argument to try to recover
23 that $8.7 million.
24 The fourth asset that is the subject of the
25 settlement agreement is the Receiver hopes to obtain

1 recovery in liquidation proceedings of the settling
2 Defendants. We want to put the Foundation into
3 liquidation. The settling Defendants have agreed to go
4 into liquidation in the settling agreement. And the
5 reason they're going into liquidation rather than simply
6 giving us everything they have is they have assets that
7 cannot be immediately turned over. They're in reserve
8 accounts and there are matters dealing with those reserve
9 accounts that have to be resolved, such as the DLT
10 reserve account. So the plan is to put these entities
11 into judicial liquidation. Notice will be given to all
12 parties, creditors, similarly in the CC Foundation case
13 notice will be given to the Attorney General with respect
14 to the charitable assets, and here the Receiver has
15 reserved a right to assert his claims against the assets
16 in liquidation.
17 Now, those assets are very difficult to value at
18 this time. There is about $2 million tied up in reserve
19 accounts. There is a dispute with Medicare, which they
20 may end up getting money or may end up having to pay
21 money, and there is a right to future income from
22 charitable trusts which is in perpetuity, your Honor,
23 which is a very valuable right. In other words, these
24 outside trusts are pouring cash into this entity in
25 perpetuity. That is what the settlement is, your Honor,

1 those four key asset recoveries. There is a lot more to
2 it, but I think for purposes of understanding the
3 mechanics of the money I think that is a pretty good
4 start.
5 Now, why is the settlement fair and reasonable?
6 That analysis is based on a comparison of the value of
7 the settlement to the value of the claims being settled
8 and that is the education partnership overarching
9 standard and then the Court sets forth the four factors -
10 probability of success, likelihood of difficulties in
11 collection, complexity, delay of the litigation, and,
12 fourth, the paramount interest of the creditors.
13 Applying those factors to this settlement, the settling
14 Defendants are basically turning over the vast bulk of
15 their assets in going into liquidation where the Receiver
16 can claim what is left.
17 Given that, because they're turning over their
18 limited assets, this settlement would be fair and
19 reasonable even if the Receiver had a hundred percent
20 probability of success on the merits, had stipulated
21 damages of $125 million. Because as one of the factors
22 points out, the likelihood of difficulties in collection,
23 you can't get blood from a stone. All you can get is
24 what the settling Defendants have. This is the rare case
25 in which it is guaranteed, your Honor, that there would

1 be less to recover at the end of the day even if the
2 Receiver prevails on all claims against the settling
3 Defendants, then the Receiver is accepting the settlement
4 now. It's just guaranteed, rock-solid guaranteed.
5 And the reason for that, your Honor, is between here
6 and there is the determination of the merits of the
7 Receiver's claims. They are entitled to full discovery.
8 Summary judgment is unusual. Trial probably will be
9 required. You have to consider the possibility of an
10 appeal, so when the time comes to have an enforceable
11 judgment with many millions of dollars in defense costs
12 later. Thus, it's guaranteed that the Receiver will
13 collect much less then than he gets now under the
14 settlement, even if we have a hundred percent probability
15 of success, but we don't have a hundred percent
16 probability of success. Litigation is not ever a hundred
17 percent and we have a lot to prove.
18 Now, in weighing whether the settlement is fair and
19 reasonable to the receivership estate, you have to
20 consider what is the impact of not accepting a settlement
21 on the receivership estate. This is the impact: If we
22 go forward and lose against the settling Defendants, we
23 get zero. If we go forward and lose against the other
24 Defendants as well, not only do we get zero, we lost the
25 only chance to get a recovery for the receivership estate

1 through this settlement. Now, if we win, as I said, your
2 Honor, we get much less.
3 So, your Honor, I really do think the issue of
4 whether this is fair and reasonable is almost
5 indisputable. And in reading the papers carefully from
6 the objecting parties, I don't hear anyone claiming that
7 the economics of the receivership estate is not
8 sufficiently favorable to the receivership estate to
9 execute a fair and reasonable settlement.
10 THE COURT: On the expense issue, it's your
11 understanding that the defense costs with respect to the
12 claim would be coming out of this or just a portion of
13 the initial lump sum?
14 MR. SHEEHAN: We understand, your Honor, and Mr.
15 Conn, if he wishes, can address this. I hope I'm not --
16 because your Honor asked, we understand they have a D & O
17 policy, but it's a waste in policy and they're already 25
18 percent into it or more. Your Honor, we have experience
19 in the 38 Studio cases with wasting policies of $10
20 million --
21 THE COURT: I'm talking about the settling
22 Defendants.
23 MR. SHEEHAN: Oh, I'm not aware of their having any.
24 THE COURT: I guess my question is in terms of
25 expense if those litigations continue --

1 MR. SHEEHAN: I misspoke.
2 THE COURT: It would be, as we talk about in
3 insurance, a cannibalization on the part of the policy.
4 MR. SHEEHAN: I believe that is the case, your
5 Honor. I am not aware that any claim has been filed
6 against any insurer that has the defense obligations by
7 the settling Defendants, and I believe that is the case
8 that it would just be a cannibalizing of the actual
9 estate.
10 Now, the fourth point, does the settlement exceed
11 the Receiver's authority? And Prospect East makes the
12 argument that what Mr. Del Sesto should have done is come
13 to the Court with notice to all parties and say there is
14 a settlement I'm thinking about doing, here is some of
15 the terms we tentatively talked about, and will you
16 approve this, your Honor, and that will give Prospect the
17 opportunity to come in and argue why some of those
18 individual terms should not be included.
19 Well, this is litigation, you Honor, and settlement
20 is hard to reach in open court with a big discussion of
21 all different parties with different interests coming in
22 and trying to decide what's fair to everybody. And, your
23 Honor, we would ask in that context to approve a morphs
24 thing. The Court would not even know what settlement it
25 was instructing the Receiver to proceed with because

1 until you have a binding agreement, you don't know what
2 the agreement is. So instead of following Prospect's
3 suggestion, the Receiver executed a settlement agreement
4 that's binding on the Receiver, that's binding on the
5 settling Defendants subject to Court approval leaving
6 full power in this Court and in the Federal Court with
7 the argument that that somehow exceeds the Receiver's
8 authority as a matter of logic is absurd, and it's also
9 contrary to the order appointing the Receiver, which
10 gives him the express authority to compromise claims.
11 THE COURT: Can you explain to me, and I understand
12 your logic, what about the filing of the UCC?
13 MR. SHEEHAN: The filing of the UCC is the ability
14 to preserve the status quo pending this Court's
15 determination. That's all it is. The signing of the
16 settlement agreement is preserving the status quo pending
17 the Court's determination. The settlement agreement
18 preserves the status quo inter se between the parties.
19 The security agreement preserves the status quo as to the
20 world outside who may seek to come and gobble up the
21 assets if they're committed to the settlement. It is in
22 no way a recovery and it goes away automatically if the
23 settlement is not approved.
24 And, by the way, your Honor, one could argue that
25 security interest is redundant. It's redundant because

1 the Court issued an order enjoining any proceeding
2 against assets that are part of the receivership estate,
3 and that order might prevent any creditor from seeking to
4 attach the assets of the settling Defendants now that
5 they are tied into the settling agreement.
6 THE COURT: It sounds like that's an issue we're
7 going to deal with next week.
8 MR. SHEEHAN: Right. Now, one point to make before
9 I move on, your Honor, with the argument that the
10 Receiver is exceeding his authority, what Prospect really
11 wanted to do is blow up the settlement, and nothing shows
12 that better by their, after the filing of the petition
13 for receivership and the petition for settlement
14 instructions, filing the petition for declaratory order
15 with the Attorney General and we filed our motion to
16 adjudge them in contempt. What they're asking you to do
17 is after the fact invalidate the settlement agreement.
18 One can only imagine what pressure they would have
19 brought to bear had they been given an opportunity to
20 interfere before the settlement agreement became binding
21 as an asset of the receivership estate. That disposes, I
22 believe, of the argument that the Receiver lacked
23 authority.
24 The next argument is that the Court should not
25 enforce the settlement because it's unlawful, and what

1 they focus on then is it may not be enforceable in the
2 sense that the assignments may not be enforceable or the
3 rights that the Receiver purports to have the right to
4 exercise upon receiving the assignment are not proper
5 rights. That is not what the courts mean when it says
6 the courts won't approve unlawful settlements. All of
7 the cases we explained to your Honor in detail, which had
8 language generally to that effect, dealt with settlements
9 that were per se unlawful. The cleanest one was where
10 the Court said what we have here is a settlement with a
11 witness to share the recovery with the witness on a claim
12 where the witness' testimony is essential, which the
13 Court said violates federal law in paying something of
14 value for testimony. It's a crime. So the very
15 agreement itself was a crime.
16 We're not talking about that here at all. Instead,
17 we're talking about the bread and butter, the run of the
18 mill kind of claims that are brought in litigation all of
19 the time. Claims that may be disputed, that may be
20 uncertain, but cannot be characterized as unlawful. And
21 to suggest that the Receiver cannot accept claims when
22 there is an argument as to the validity of the claims,
23 when the argument is the validity of the assignment
24 cripples the Receiver in a way no other contracting
25 party, no other settling party, no other litigant is

1 crippled. It really is a silly argument and the proof of
2 that is they found not a single case that deals with that
3 kind of analysis.
4 To the contrary, we cited your Honor to the
5 bankruptcy court case from Connecticut, which really
6 shows in many ways a strong analogy here. There the
7 bankruptcy trustee had assigned the debtor's legal
8 malpractice claim to a creditor and the creditor was
9 going to pursue that claim and share the recovery with
10 the trustees. Now, there was an issue. I believe the
11 law of Arizona actually applies, even though it was in
12 Connecticut, and there was an issue as to whether under
13 the law of Arizona you could assign legal malpractice
14 claims. The Federal Court approved the settlement noting
15 there is an issue as to whether or not this assignment is
16 enforceable. You go find out, I'm going to retain
17 jurisdiction, and if it turns out it's not enforceable we
18 will deal with that later. That's the
19 In Re: SE Techs case, which is cited in our memorandum,
20 T-E-C-H-S.
21 Now, so the argument that it's unlawful just really,
22 really takes uncertain and doubtful claims and makes them
23 unlawful. In which case we would be suing for abuse of
24 process all over the place, your Honor, every time you
25 lost a case. On the collusion point, the reason that

1 Prospect East argues that the settlement is collusive is
2 because it disadvantages Prospect East. And when I get
3 to the standing argument, I am going to address why that
4 is insufficient to give standing, why it does not
5 constitute plain legal prejudice, which is the standard.
6 And you can't come in through the back door and make the
7 argument under the guides of collusion that you're
8 prevented from making as an effect on your legal
9 interest, as we will get to, to give standing.
10 But in any event, the collusion that exists here is
11 all to the benefit of the receivership estate. In other
12 words, I'm using collusion non-judgmentally to mean an
13 agreement between the settling Defendants and the
14 Receiver in which the Receiver demands as part of the
15 settlement that the settling Defendants do certain things
16 to damage or improve the Receiver's tactical position
17 against third parties. That is what settlements often
18 do.
19 And the best case on that point, your Honor, and
20 just coming right out and saying that is the
21 Quad/Graphics case from the Seventh Circuit in which the
22 Court held that the Receiver has the right to use a
23 settlement to gain tactical advantages over non-settling
24 Defendants and pointed out from any settlement some
25 disadvantage to the remaining Defendants is bound to

1 occur and may, in fact, be the motivation behind the
2 settlement. There is nothing wrong with me settling with
3 party A to improve my claim against party B.
4 Now, your Honor, we come to issue of standing and
5 the objectors lack standing for several reasons, and I'm
6 going to get into all of them. But before I do, I would
7 really like to address why it matters, whether these
8 issues are decided now or later, and the answer to that
9 question is it depends. If you're the settling
10 Defendants it matters very little. There is some
11 inconvenience and some delay. If you're the receivership
12 estate, it's the end of the world potentially. And the
13 reason I say that, your Honor, with respect to it matters
14 very little to the objecting parties, is that their
15 objections are going to be the same when the Receiver in
16 an adversary proceeding asserts the claims based on the
17 rights the Receiver purports to have than they have now.
18 They are going to have the same objections. The Court is
19 not giving its imprimatur and we're not asking -- as the
20 Court asked at the outset, we're not asking for the Court
21 to rule as a matter of law that these rights are
22 enforceable, et cetera. To the contrary, we would think
23 that would be inappropriate, your Honor, because this is
24 right now pre-assertion of a dispute on those rights.
25 It's not ripe to make that determination.

1 THE COURT: So tell me a little about what you
2 envision in terms of an adversary proceeding where, not
3 here, but at some point the parties will have the
4 opportunity if they have standing there to assert certain
5 rights.
6 MR. SHEEHAN: There are several ways, your Honor.
7 We are contemplating bringing what is called a usurpation
8 action against CC Foundation to essentially throw out a
9 claim usurping individuals, usurping the power of the
10 board. We intend to put CC Foundation into a judicial
11 liquidation, and in that context our claim to be a sole
12 member would be adjudicated.
13 With respect to the 15 percent interest in Prospect
14 CharterCare, we intend to demand that Prospect
15 CharterCare pay over the value of the 15 percent in
16 connection with the exercise of the foot and if they
17 don't we're going to sue them. All of this is going to
18 go into court and what is more, your Honor, it's going to
19 go into the court proceeding that is already started
20 where these very assets are already tied up. We are
21 already asserting claims in the Federal Court litigation
22 to all of the assets of Prospect CharterCare. We're
23 claiming they received them in a fraudulent transfer. If
24 we get all of those assets, Community Board's 15 percent
25 interest in Prospect CharterCare is a stock certificate

1 you can tape on the wall. It is worthless because there
2 are no assets.
3 We are asserting in the Federal Court that the $8.2
4 million should not have gone to CC Foundation in the
5 first place. That it's a fraudulent transfer and should
6 have gone to the debtors under the dissolution and
7 liquidation statutes. Once we prevail on that theory, if
8 we do, a membership interest in CC Foundation is another
9 certificate one could tape on the wall that has no other
10 value because there is nothing left.
11 THE COURT: What about before we get there, the
12 settlement agreement talks about immediately assigning
13 certain rights.
14 MR. SHEEHAN: Absolutely.
15 THE COURT: So does that just occur and for other
16 parties to contest it if they receive notice of it?
17 MR. SHEEHAN: They can. I mean we will give notice
18 of the assignment. In fact, the settlement agreement
19 expressly requires notice of assignment to be given. If
20 they feel at that point they want to try to litigate the
21 the validity of the assignment in the context of the mere
22 existence of the assignment before any rights have been
23 asserted, they can try. We will argue again that it's
24 premature until we're asserting any rights based on the
25 assignment but they can take a different position.

1 THE COURT: When you're saying they, I assume you're
2 referring to CharterCare Foundation and Prospect.
3 According to the A.G.'s objection they may have an issue
4 with respect to that.
5 MR. SHEEHAN: The A.G. has standing with respect to
6 any charitable assets and certainly would have the right
7 to participate in the liquidation proceeding against the
8 Foundation and the A.G. would contend that these assets
9 cannot be used to pay the claims of the plan because they
10 are charitable assets and that is already in the court
11 proceeding where the issues have been identified, the
12 roles of the parties are clear, in essence, where the
13 question is ripe.
14 Now, so we believe, your Honor, that postponing that
15 determination has very little impact on the objecting
16 parties, but it has horrible impact on the receivership
17 estate if those issues are decided now or before Judge
18 Smith in the Federal Court. And the reason is that all
19 of the objectors have taken the position that if this
20 Court or if -- well, they haven't addressed Judge Smith's
21 court yet. If this Court concludes that these assignment
22 provisions are improper, that the Court has to reject the
23 entire settlement. And we do not adopt that argument
24 now, but we have to say that there is case law that very
25 strongly supports that position and the reason is that a

1 settlement agreement is a contract. The Court typically
2 cannot rewrite a party's contract for them.
3 There is a case from the Western District of
4 Arkansas, In Re: Living Hope Southwest Medical Services,
5 involving the Court's approval of a trustee's recommended
6 settlement where the Court said a compromise or
7 settlement is by definition a negotiated consensual
8 agreement. A bankruptcy court cannot rewrite the
9 agreement and by doing so approve terms that is different
10 from those to which the parties agree. A bankruptcy
11 court must, "accept or reject the settlement as
12 presented." And that is clearly the law in the Federal
13 Court, your Honor, in connection with class actions.
14 There is dozens of cases that say that.
15 What that means, your Honor, is that the $12 million
16 that my brothers and sisters are now saying they have no
17 objection to being distributed, there is no obligation on
18 the part of the settling Defendants to pay the $12
19 million. It's very easy for them to say that, but there
20 is no contractual obligation or duty on behalf of the
21 three settling Defendants to do that if the Court rejects
22 the settlement.
23 And I would like to contrast, your Honor, to the
24 context in which the Receiver asserts rights in an
25 adversary proceeding having already obtained the $12

1 million if it's determined in the adversary proceeding
2 that my brothers are correct, that these assignments are
3 invalid, the consequence then is not that the settlement
4 is invalid. The consequence then is that this attempt by
5 the Receiver to collect assets fails against those
6 individuals, but the Receiver keeps the benefits of the
7 settlement.
8 So, in essence, what one is weighing, your Honor, in
9 weighing the decision to address the merits of these
10 objections now or in an adversary proceeding, one is
11 weighing the inconvenience to the objecting party of the
12 delay. Again, the loss is $12 million that no one
13 disputes the receivership estate should obtain. It's not
14 as if there is an argument about whether they should get
15 the $12 million. It's just an unfortunate consequence of
16 the rule that a court in approving or disapproving a
17 settlement has to go up or down. The Court can't rewrite
18 a contract. The way to get around that unfortunate
19 unintended consequence and save the receivership estate
20 from gross, horrible prejudice, assuming my brothers are
21 right in their objections, is to determine it in an
22 adversary proceeding. To determine it now is just a
23 willful injury to the receivership estate for no purpose
24 other than inconvenience of delay.
25 When one considers inconvenience of delay, my

1 brothers and sisters in the receivership estate are going
2 to be litigating many issues possibly for many years in
3 the Federal Court regardless of this particular
4 settlement agreement, and we're going to be litigating
5 issues involving the very assets. They're not going to
6 be able to, even if this Court were to accept their
7 arguments now as to the validity of the assignments,
8 they're not going to free the assets up. They are
9 already the subject of claims in the Federal Court. So
10 their inconvenience, I'm not sure if there is any.
11 THE COURT: Counsel, you wouldn't disagree that if
12 the Court were to hypothetically authorize to enter into
13 the settlement agreement, that the Court separately could
14 impose certain conditions on the Receiver, notice and
15 other things they need to do in connection with going
16 forward?
17 MR. SHEEHAN: Not only could the Court do that, your
18 Honor, we would welcome that. We have no desire to act
19 here in the dark of the night. Really some of these
20 statements in the opposition memorandum sort of apply to
21 suppliers not Receivers.
22 THE COURT: One of the primary issues is the
23 objections, and we'll deal with this later, are they
24 premature?
25 MR. SHEEHAN: I'm going to get to that now, your

1 Honor. As a prefatory to that, I want to explain what is
2 at stake on the prematurity argument. Now, we can get to
3 the merits of the prematurity argument. They're
4 premature, your Honor, because at this point regardless
5 of what the Court rules in terms of this settlement, it
6 causes no injury to the objectors and that is because all
7 the Receiver is going to do is go to another court. The
8 Receiver is not going to take any actions on the
9 settlement other than go to another court, and,
10 therefore, the objectors are not going to be in any worse
11 position then than they are now.
12 Now, that's assuming that their objections have
13 merit. Obviously, if they're objections have no merit,
14 then they are not suffering any injury by postponing the
15 determinations of labor. Even if they do have merit,
16 they suffer no injury. Then they actually suffer no
17 injury until an adversary proceeding is done, until
18 rights are exerted and that is key, your Honor. It
19 really is important to get past the settlement stage
20 between these two courts before those rights are
21 adjudicated.
22 Now, the next point, your Honor, prematurity is
23 certainly an element of standing. There are standing
24 arguments that stand on their own rights, and the first
25 is that their objections are not justiciable. That's an

1 issue of basic requirement. No court can decide an issue
2 unless it's justiciable.
3 THE COURT: Your firm spent a lot of time on Watson
4 v. Fox, which our Supreme Court interpreted in detail.
5 MR. SHEEHAN: Now, justiciability has two elements -
6 a party has to have standing and a party has to have a
7 legal hypothesis that would entitle the plaintiffs to
8 real and articulable relief. We focus on here with
9 respect to justiciability is the lack of standing. For
10 purposes of justiciability, standing is defined. It
11 means that the objectors must have an injury in fact and
12 an injury in fact is defined as an invasion of a legally
13 protected interest which is concrete and particularized
14 and actual or imminent, not conjectural or hypothetical.
15 That is a paraphrase of the Warwick Sewer case from 2012.
16 They have no invasion of a legally protected interest by
17 virtue of the granting of the settlement if your Honor
18 limits its ruling to whether or not it's in the best
19 interest of the receivership estate, or if Judge Smith
20 approves the settlement without ruling on the merits of
21 these objections. So the issue is not justiciable at
22 this time.
23 The second reason they have no standing, your Honor,
24 is because there is a separate stricter standing
25 requirement that goes beyond justiciability that is

1 applied in the context of petitions to approve
2 settlements. And that standard, your Honor, is that
3 non-settling parties have no standing to object until the
4 settlement causes them plain legal prejudice, and we have
5 cited a number of cases for that proposition, your Honor,
6 none of which, I believe, have been disputed. And the
7 reason it's a stricter standard than mere justiciability,
8 your Honor, is the rule advances the policy of
9 encouraging the voluntary settlement of lawsuits. There
10 is a case out of the Second Circuit, 2014, that makes
11 that point. It's called Bhatia v. Piedrahita,
12 756 F.3d 211. The cases establish that plain legal
13 prejudice is a strict standard. It does not include mere
14 injury in fact. It does not include tactical
15 disadvantage from a settlement. It does not include that
16 the settlement makes a second-like lawsuit likely or
17 certain. That is the Quad/Graphics case again, your
18 Honor.
19 So the fact that this settlement is going to
20 potentially spin into additional lawsuits does not give
21 standing to the objecting party as a matter of law. It
22 does not constitute plain legal prejudice. Your Honor,
23 the overall position for which we are advocating that
24 these issues be decided in the context of the adversarial
25 proceeding -- actually, although there is no specific

1 authority involving settlements, other than the case to
2 which I referred your Honor from Connecticut that we are
3 aware of, the general rule is that parties are not
4 allowed to litigate a trustee or Receiver's claims
5 against them until those claims are asserted.
6 And we cited a number of cases, four or five to that
7 effect, but the clearest case is In Re: Hartley,
8 36 B.R. 594, where punitive debtors of the bankruptcy
9 estate went into court for an injunction to enjoin the
10 trustee from suing them on claims. The trustee was
11 asking for authority to make those claims and they came
12 in and said don't give them the authority and they raised
13 the point that don't give them the authority because the
14 claims lacked merit. Very analogous to what we have
15 here, your Honor. And what the Court said is that the
16 merits of the trustee's claims, if any, against the third
17 party should be determined in whatever form the trustee
18 initiates in his claim and should not be preempted by
19 this Court. The Court should not and will not rule on
20 the merits of the trustee's claim, if any, other than in
21 an appropriate adversary proceeding initiated on the
22 claim, and the benefits of that are clear, your Honor.
23 It ensures a concrete dispute.
24 For example, your Honor, Mr. Del Sesto pointed out
25 at the outset that this settlement is valid even if after

1 the settlement is approved, assuming it is approved, the
2 Receiver chooses not to proceed on any of these assigned
3 claims. Well, in that case this whole argument about
4 whether those assigned claims are valid is moot. So the
5 Court really is being asked to rule before the Receiver
6 has committed himself to even asserting those claims.
7 Courts don't do that for a reason, your Honor, because
8 otherwise people would be coming to court every time we
9 have a question. That's not what courts are about.
10 Courts are about adjudicating concrete disputes, and
11 that's why trustees are entitled to bring the claim. One
12 could imagine if in receivership proceedings the merits
13 are being litigated about all the claims the Receiver is
14 going to assert. That is the pre-bite at the apple we
15 mentioned in our memo. He comes in and says the claims
16 are meritless, loses, and then when the Receiver asserts
17 the claim, makes the same argument again.
18 Finally, your Honor, at the end of the day it's
19 clear the objectors have absolutely no interest in
20 benefitting the receivership estate. They have their own
21 interests but they're not the interests of the Receiver.
22 They are adversaries. They are in litigation with the
23 Receiver. What is much more important, your Honor, to
24 our application for the petition for settlement
25 instructions is the support from the hundreds of plan

1 participants, your Honor, represented by Attorney Kasle,
2 Violet, Callaci, and the many other individuals who don't
3 have the benefit of an attorney at this time and who will
4 benefit from the settlement.
5 THE COURT: Counsel, when you talked about standing,
6 again we have a few objections. Do you have a position
7 in terms of whether the Attorney General has standing at
8 this point?
9 MR. SHEEHAN: I agree that the Attorney General --
10 well, your Honor, no, the Attorney General does not have
11 standing, absolutely does not. And the reason the
12 Attorney General does not is there is nothing happening
13 to charitable assets now. There is just the adjudication
14 of the right of a member of a charitable corporation. We
15 are a long way from getting near those assets. Every
16 dispute in a nonprofit corporation between the members
17 does not involve the Attorney General coming in and
18 coming up to a decision as to what the bylaws provide or
19 don't provide and who gets the vote and when. It's only
20 when the corporation gets around to doing something with
21 charitable assets. That's the trigger and that trigger
22 is just as we're not doing anything with the 15 percent
23 interest in Prospect CharterCare. We're not doing
24 anything with those charitable assets, so absolutely zero
25 standing to the Attorney General now, just as much, if

1 not more, than the other objecting parties.
2 THE COURT: For example, talking about Prospect, if
3 the Receiver down the road was to take the position that
4 they could, either through the put option or through some
5 assignment, and the Attorney General, it's in their
6 papers, Prospect has it in their papers, that somehow
7 this transfer is a violation of the Hospital Conversion
8 Act, are you saying that at some point they have the
9 ability to take that position?
10 MR. SHEEHAN: Your Honor has just posed a
11 hypothetical to me and --
12 THE COURT: What I'm trying to do is kind of key off
13 and maybe it will become clearer when Prospect goes
14 through some of the issues.
15 MR. SHEEHAN: I just want to emphasize they haven't
16 made that argument, as your Honor has pointed out.
17 THE COURT: The Attorney General has not.
18 MR. SHEEHAN: And were they to make that argument
19 now, the answer again would be that until the settlement
20 is approved, we don't even have the right to obtain that
21 15 percent interest, and so it's premature until this
22 court acts and until Judge Smith's court acts. It's
23 premature because, for example, should Judge Smith
24 disapprove the settlement, the Attorney General has
25 nothing to complain about. So one doesn't get to

1 disputes that may never arise.
2 THE COURT: Thank you. Attorney Wistow, did you
3 have something to add?
4 MR. WISTOW: I'm sorry.
5 THE COURT: When you came up initially, I thought
6 you said Attorney Sheehan would speak and I didn't know
7 if you had something further.
8 MR. WISTOW: I am hoping the procedure we follow is
9 that now the Defendants speak and then I respond to that.
10 THE COURT: That's fine. In terms of the objections
11 that the Court received, we are going to move on next to
12 the CharterCare Foundation. Good morning.
13 MR. DENNINGTON: Good morning, your Honor. Andrew
14 Dennington for CharterCare Foundation. And on behalf of
15 CharterCare Foundation our request is that this Court
16 expressly disapprove of the settlement, even in the
17 limited form of approval that the Receiver is inviting
18 the Court to undertake. I understand that the Receiver
19 has basically put out an invitation that the Court should
20 limit its review simply to whether the settlement is in
21 the best interest of the planned participants. Stated
22 plainly, whether it's a proverbial good deal for the
23 debtors, and, basically, set aside all other issues to be
24 dealt with at the Federal Court stage. And we have a
25 very different opinion because I think you cannot set

1 aside the legality issue.
2 First, I would like to address the standing argument
3 and after I address standing, I will address our specific
4 grounds for objecting to the settlement on the grounds
5 that it violates Rhode Island law and public policy and
6 at the end I would like to wrap up my comments. And also
7 in my argument I have a comment about the prejudice that
8 would occur to CharterCare Foundation if we basically
9 kick the can down the road on the legality question one
10 more time.
11 So I would suggest that in a case like this where
12 there is hundreds of pages of paper and there is a
13 seeming perception that we strongly Court on every single
14 point, that it's useful for the Court to pick out a
15 couple of points where there is actually some conversion
16 between the arguments made by CharterCare Foundation and
17 the Receiver. Those can be used as kind of a focal point
18 to help build to get to a fair and just outcome. I
19 thought it was very significant that both the Receiver
20 and CharterCare Foundation agree that in the absence of
21 any applicable Rhode Island state court law regarding how
22 a judge in your position should handle a petition for
23 approval of a settlement in a receivership action that we
24 turn to the bankruptcy code and federal case law
25 interpreting. That's one thing we agree on.

1 As we laid out at pages 10 through 12 of our
2 objection, we think it's clear under federal bankruptcy
3 law the standing issue turns on whether one is a party in
4 interest. I think what they are raising here is a
5 separate prudential standing.
6 THE COURT: I guess, counsel, I think the Court's
7 concern is our Supreme Court in the Reynolds case said,
8 look, we have no state law on the issues, no precedent,
9 and as far as priority creditor claims we're going to
10 look to the bankruptcy code. And over time Judge
11 Silverstein himself said, yes, we're going to look to the
12 bankruptcy law. I guess my question is, and I
13 understand the part of the interest standard, but what
14 about the fact that we do have very specific precedent
15 dealing with the standing issue from the Rhode Island
16 Supreme Court. Does the Court have the ability to say
17 I'm going to disregard that and I'm going to go under the
18 bankruptcy code under 919 or whatever section and look at
19 the party of interest standard. So it's which the Court
20 would be applying and that's what I'm wrestling with.
21 MR. DENNINGTON: I think you do have to apply both.
22 There is a threshold justiciability prudential standing
23 doctrine and then there is the injury in fact standing to
24 object to settlement. It's also true in the Federal
25 Court. There is an Article 3 prudential standing. I was

1 looking for a specific case that I was trying to get my
2 hands on that would help me here. It's the Congregation
3 Jeshuat Israel case. It's a trial court decision. There
4 is an excellent quote basically getting at the heart of
5 the standard doctrine is to prevent mere kibitzers from
6 coming up and interest group seekers from going about
7 issues. If, for example, a private interest group, like
8 the Philanthropy Roundtable, which would have members to
9 protect charitable assets, was to be here making an
10 argument, maybe there is an issue there. Here, is there
11 injury in fact to us from this proposed settlement?
12 Basically what they are asking you to do is to give
13 CharterCare Community Board a gun to shoot CharterCare
14 Foundation, and the issue is I don't think --
15 THE COURT: Counsel, if what you're saying is if I
16 accept party in interest, it's still a two step and there
17 is plenty of case law on that. How does CharterCare
18 Foundation meet that injury fact at this stage of the
19 proceeding if we need to get there before you get to the
20 party in interest?
21 MR. DENNINGTON: Sure. And in answer to that
22 question I would like to emphasize how CharterCare
23 Foundation has a pretty unique position as opposed to the
24 other three groups of defendants, which are the Diocesan
25 defendants, the Prospect entities, and the old Heritage

1 Hospitals/CCCB.
2 Now, it was not really in response to a question but
3 Mr. Sheehan did hint at the fact that CharterCare
4 Foundation has very limited resources, and the ultimate
5 question in this case is: Is what we are doing legal or
6 not legal? We are in the business of administering
7 charitable trust assets in a manner, which is in
8 accordance with the original donor's intent as
9 inconsistent with your Honor's April 20, 2015, order.
10 For many of the same reasons that we had standing to
11 object to the attempt to vacate or we will have the
12 standing to vacate that order, we likewise have standing
13 to object to the proposed settlement.
14 I mean just to call a spade a spade, this is the
15 settlement agreement. The ultimate object of which is to
16 take the charitable trust documents and to use them for a
17 purpose which is not consistent with the donor's intent.
18 That's the ultimate issue. And I think the Court should
19 be sensitive to the fact that many times standing is an
20 attempt to kind of defer or deflect attention from a
21 substantive issue, which here is that ultimate question -
22 is this legal or is this not? Going back to the analogy
23 about the gun, I don't think we have to wait until the
24 gun is literally in the face of our client to say now we
25 have a injury in fact. We all know where this is going,

1 and I am going to answer your question but I do want to
2 bring the Court's attention at the appropriate point to
3 the In Re: Telcar case.
4 THE COURT: Can you point me to a case? I guess
5 what you're saying is we all know it's coming, therefore,
6 we should be allowed to get involved now and not in an
7 adversarial position.
8 MR. DENNINGTON: Yes, sir.
9 THE COURT: Not with respect to the party in
10 interest, but with respect to the standing issue, with
11 respect to the the state law standing issue. I read the
12 party in interest case and, yes, it has been interpreted,
13 even though it talks about trustee and creditor, it uses
14 the word excluding. The courts have gone and expanded
15 that. I'm more concerned with what you're saying it's a
16 two-step process.
17 MR. DENNINGTON: I think they are very related
18 concepts so I'm going to answer your question and then
19 I'm going to go back to the In Re: Telcar case. As I
20 was saying, we are different. I think the prejudice and
21 the injury that CharterCare Foundation suffers from this
22 two-step, three-step process, don't worry, we're not
23 going to litigate the ultimate entitlement to these funds
24 until Judge Smith sees it.
25 There is also a suggestion in their papers that they

1 intend to argue that even if you were to limit their
2 review and preserve our objection to make the legality
3 objection in Federal Court, they would still say we still
4 don't have an injury in fact, we still don't have
5 standing. We are unique in that we suffer real harm from
6 the ride itself, from the litigation. Okay.
7 Mr. Sheehan made reference to, you know, the
8 circumstances that drive the defense of CharterCare
9 Foundation. Remember, we are not a non-profit entity.
10 We're a charitable trust to administer that donor intent,
11 one full-time employee. So you can put us out of
12 business with a decision which says the funds you got in
13 2015 never should have came to you. You know, it is okay
14 to take charitable trust assets and use them in a way
15 that is not in accordance with your intent or you can
16 also put CharterCare Foundation out of business through a
17 long litigation process. That would be bad because if
18 the Court truly feels that it's the law that charitable
19 trust assets may be not be used in a manner inconsistent
20 with donor intent, then we don't want to have a process
21 that unintentionally puts CharterCare Foundation out of
22 business because every opportunity you'd want to get to
23 the heart of the matter. The Receiver has a litigation
24 strategy of saying we'll do it six months from now, we
25 will do it six months from now.

1 This is an interesting point. This was my
2 conclusion but I'll cover it now. Why is everyone here?
3 Why are so many people here? It's to get the $12
4 million. We don't have a problem with that. Okay. We
5 want that to move expeditiously, but the Receiver created
6 the situation that we're in right now, which is bundling
7 up the settlement with all these other more extensive
8 provisions. You can't reasonably expect we're going to
9 stand by seeing a settlement, which is going to deliver a
10 death war and say nothing about it. Okay. We're going
11 to vigorously present our argument here.
12 Now, in the In Re: Telcar Group case, I have brought
13 copies of it.
14 THE COURT: I've actually read it.
15 MR. DENNINGTON: Wonderful. Okay. That is
16 significant, you know, identifying areas where we tend to
17 agree. There is a suggestion that we both recognize that
18 is an important case. It's a federal bankruptcy case in
19 which a punitive debtor of a debtor, that's the majority
20 term to refer to us, successfully convinced the
21 bankruptcy judge to disapprove a settlement because it
22 was against public policy. Mr. Sheehan's description of
23 the fact was not entirely accurate. He said the holding
24 of the case was the judge found the contract was illegal.
25 Actually, the judge said, there was a criminal statute at

1 issue, "Whether it is actually criminal conduct is not
2 for the Court to now decide. Rather, the Court must
3 consider the effect of the settlement and no matter how
4 the issue is parsed, the reimbursement to Mignone is tied
5 to success in the litigation against the Levey entities."
6 In other words, call a spade a spade. The ultimate
7 object to this is to have an arrangement where one guy
8 gets the money in exchange for testifying in a case.
9 That's wrong. Our analogy here is we're a punitive
10 debtor of a debtor and the ultimate object of this case
11 is to take all of our charitable trust assets and give
12 them to the Receiver which violates the charitable trust
13 act in Rhode Island common law.
14 So I think your Honor's question was more about
15 credential standing. Again, the In Re: Telcar Group
16 case doesn't discuss this, but that could be either of
17 two ways. The judge overlooked it, all the parties in the
18 case overlooked it, or that we were so clear that
19 standing was present that the Court elected to let that
20 punitive debtor be heard.
21 So if you'd like I can move on to the more
22 substantive issues.
23 THE COURT: Please.
24 MR. DENNINGTON: This is an admittedly extreme
25 hypothetical, okay, but I just make it to try to

1 illustrate a point here. What if instead of a settlement
2 term, which says CharterCare Community Board feels it's
3 under threat, wants to get out of the case, the Receiver
4 is demanding all their money, they want something more,
5 instead of throwing in this punitive claim for
6 CharterCare Foundation, they said we will cooperate with
7 you in robbing a bank. We'll cooperate with you. We
8 have this related entity. We think they can pick their
9 pockets. We'll help you do it. That was the settlement
10 that came to the Court. It's an extreme example. But
11 would your Honor say it's in the best interest of the
12 planned participants and it's not this Court's role to
13 get into questions of the legality? We'll just kick the
14 can down the road. I don't think you can do that.
15 And I think the key quote from the In Re: Telcar
16 Group case that handles both the legality issue and the
17 standing issue is that, "Although it has been urged that
18 the Court need not entertain the objections of the
19 non-creditor parties," comma, and I put parties in bold,
20 "the Court is obliged to consider the public policy
21 implications of the settlement, whether or not the issue
22 is raised at all, much less by a non-party." In other
23 words, it doesn't even really matter if there is someone
24 that actually is following the law and says this is
25 wrong. The Court has its own obligation to do that.

1 THE COURT: What exactly is the court saying is law?
2 I understand based on what your brother counsel said that
3 there may be a dispute whether or not the Receiver can
4 take the interest, then there may be a dispute if there
5 is an interest whether there was some type of waiver
6 argument, that the language counsel used in a prior
7 proceeding, and, ultimately, if all that happens and
8 there is a board that is appointed, there may be an issue
9 in terms of kind of the $8 million question, which is
10 what happens to charitable assets that may have a
11 specific donor intent with respect to the creditors?
12 Aren't we allowed to step away from -- what if the Court
13 should decide all that now and say this is illegal and
14 shouldn't be allowed to do anything?
15 MR. DENNINGTON: Yes.
16 THE COURT: Okay.
17 MR. DENNINGTON: For example, and I can analogize to
18 the In Re: Telcar case. Similarly here, the approval was
19 to green light another proceeding, an adversary
20 proceeding. I think if special counsel was appearing and
21 was the one responding to the proposed settlement in that
22 case, they would make the argument this is premature.
23 Judge, you should defer this because there is going to be
24 an adversary proceeding. Mignone will be called to
25 testify. At that point you should wait to determine

1 whether -- that is the proceeding that is referenced in
2 18 U.S.C. 201. That is when we determine whether or not
3 that is legal and I think it certainly supports our
4 position. That's why I'm stressing it so much. The
5 judge did not go through all those semantics, didn't
6 parse the issues in that way. Again, I keep
7 emphasizing --
8 THE COURT: So in other words, I should, within the
9 receivership proceeding, create an adversary proceeding
10 or a trial to make a determination because I can't do it
11 without hearing from the sides. I can't just say the
12 settlement agreement as a matter of law. You may say I
13 could. I haven't looked at the settlement. But I should
14 hear that and conduct that process before the Court
15 approves this to go on to the next step.
16 MR. DENNINGTON: I'm not suggesting that.
17 THE COURT: Okay.
18 MR. DENNINGTON: Because I don't think you need --
19 this is an issue which can be determined, the legality
20 issue -- we have no law. I don't think we need -- we
21 don't have too many real -- there is not a factual
22 dispute that the assets that CharterCare Foundation are
23 restricted charitable trust assets. I point the Court to
24 the case law suggesting why those may not be diverted and
25 used in a manner not consistent with the donor's intent.

1 I don't think you need to have a whole trial.
2 THE COURT: Okay. Assume we get to the end and
3 there is a determination that those restricted assets
4 that can't be transferred, would the Receiver have the
5 ability to, if they can, take on the interest to then
6 replace the board, and I know there is an issue in terms
7 of who the board members may be, and they may say, look,
8 we don't need an administrator who is going to take
9 assets out. We want to do it in a different way. Even
10 if we can't do anything with that $8.2 million, there is
11 still things we want to do. Is there a determination
12 that has to be made that the interest is transferable to
13 the Receiver and can the Receiver as the sole owner
14 replace the board? Otherwise, I set you free and say we
15 don't have a shareholder anymore or a member. It's the
16 board and whoever else so just go ahead.
17 MR. DENNINGTON: Your Honor, under the Rhode Island
18 Contract Corporation Statute, a Rhode Island nonprofit
19 corporation may have one or more members or no members.
20 THE COURT: I understand that. Right now at least
21 the settling Defendants, I understand they may have a
22 dispute.
23 MR. DENNINGTON: There is a dispute. We're
24 definitely not going to be getting into today.
25 THE COURT: You're asking me not today, but before I

1 go through this to make my way through, you know, all
2 those issues.
3 MR. DENNINGTON: Well, I mean if your Honor is
4 inclined to -- we feel quite strongly but --
5 THE COURT: And I read all the alternatives in your
6 papers.
7 MR. DENNINGTON: Okay. So here is what I would
8 suggest. In one of the questions you posed to Mr.
9 Sheehan, you said the Court can impose certain
10 conditions, just notify them. We know that it's going to
11 happen. That would be about the time we should then jump
12 up and file more papers and object to it. As I said,
13 okay, that path seems to be the path of unintentional
14 giving up of restrictive charitable assets because it
15 leads to the death of CharterCare Foundation through
16 prolonged litigation instead of a carefully considered
17 judicial decision, but I think that is not a meaningful
18 condition.
19 A better condition would be -- the Rhode Island
20 Attorney General is a necessary party to this question.
21 You can impose a condition that says, you know, that
22 portion of the settlement is only approved upon the
23 express condition that the Rhode Island Attorney General
24 approves it. That was a condition that was in the HCA
25 decision. That was a predicate to any transferred

1 charitable trust assets and/or that provision of the
2 settlement agreement is conditioned upon some type -- and
3 I haven't articulated this as well, but some type of a
4 successful motion to vacate that order.
5 And one thing I observed and I don't know whether my
6 antenna are reading this correctly. It's interesting
7 that in a joint conference call between your Honor and
8 Judge Smith there was a great deal of anticipation built
9 up for the intervention motion of the 2015 Cy Pres
10 action. Your Honor issued your bench decision allowing
11 that but making it clear it was not a ruling on the
12 merits. The natural next step, we thought it was going
13 to come one day later, is the much anticipated, much
14 celebrated motion to vacate, which was going to get right
15 to the heart of the matter. I sense they want to dodge
16 this issue because they know it was a weak point. We
17 want to get right to the heart of the matter, which is
18 restrictive charitable assets can't be used for a donor
19 intent. And if you find that they can, then there is a
20 ruling, potentially we appeal it, but we've got an answer
21 to that.
22 THE COURT: I believe to put it in context, if
23 you're going to talk about statements on the call, there
24 was a comment by counsel representing your client that we
25 are seriously considering going up a writ of cert

1 certiorari which may delay this issue as well.
2 MR. DENNINGTON: That's right. That's a fair point,
3 your Honor. It hasn't happened yet.
4 THE COURT: Right.
5 MR. DENNINGTON: I will try to wrap up. I think you
6 have the thrust of what I'm saying. One of your
7 questions the way to frame my last argument, this is
8 where I think there is going to be a lot of overlap
9 between what I say and what the Attorney General says.
10 You posed kind of, I think, a different maybe the third
11 path about how the death of CharterCare Foundation which
12 is that all of the board gets fired. There is a letter
13 saying Mr. Conn and Mr. Dennington you're fired, and, you
14 know, there is that change in control. Okay.
15 As you know, why we think this violates Rhode Island
16 law is because the CharterCare Foundation is no longer an
17 independent foundation and I thought there was a
18 remarkable concession by the Receiver at pages 55 to 56
19 of their reply brief. They, in making, in our view,
20 inappropriate hyperbolic attacks on the Attorney General
21 listing numerous ways that the Attorney General
22 purportedly violated the Hospital Conversion Act, one of
23 them was allowing CharterCare Foundation to be controlled
24 by one of the transacting parties, i.e. CharterCare
25 Community Board rather than being independent. This is a

1 remarkable concession because they're saying that the
2 Hospital Conversion Act prohibits CharterCare Foundation
3 from being controlled by CharterCare Community Board.
4 They basically admitted that the means to break into the
5 house violates the Hospital Conversion Act. You have
6 what you need right now to make that determination.
7 THE COURT: Would you feel more comfortable if I
8 said, fine, under the other statutes -- I know it was
9 raised by your brother in a footnote kind of back way --
10 if I say, fine, I'm going to ask the presiding justice
11 for a point of view?
12 MR. DENNINGTON: Well, as I think your Honor said
13 about one of the other arguments, you got a lot on your
14 plate, and this is another fairly complicated issue and
15 the context in which that came up was there was this
16 petition for settlement instruction was originally marked
17 on less than ten days notice. We had to run in court as
18 quickly as we could about the reasons why the Hospital
19 Conversion Act requires CharterCare Foundation being an
20 independent board. Now, remember CharterCare Foundation
21 was not a new entity. It was an existing entity. That
22 statute references a new entity. What happened was, and
23 there is specific discussion of this in the A.G. HCA
24 approval is that the A.G. said, you know, the ultimate,
25 you know, goal here is independent foundation. We have

1 an existing foundation. What we can do is impose a
2 condition prohibiting board overlap and monitor
3 conditions and that will ensure if it shall be
4 independent. That is what happened here.
5 Again, it's really kind of a non-issue. We are
6 facing the Federal Court complaint. We're facing the
7 state court complaint, the 2015 Cy Pres proceeding, the
8 new amended complaint filed at 6:15 on Friday evening,
9 and now they're contemplating other -- I don't know what
10 the term was, usurpation action. You should reserve
11 judgment until it's actually presented in papers and we
12 have a real opportunity to present. This doesn't go to
13 the issue of whether the settlement is legal or illegal.
14 So I think I made my argument. If you have any
15 other questions.
16 THE COURT: No. Thank you very much. The court
17 reporter has been going for about an hour and 40 minutes.
18 We are going to take about a ten-minute break and when we
19 return if the other defendants as well as I will hear
20 from the plaintiff. The Court is in recess.
21 (R E C E S S)
22 THE COURT: We're going to keep this somewhat
23 manageable. I am going to ask Attorney Wistow if he
24 wishes to respond to CharterCare Foundation and then
25 we'll move on to the next issue.

1 MR. WISTOW: Thank you, your Honor. The first thing
2 that I want to address is the defendant's disappointment
3 that I haven't jumped all over the Cy Pres case and the
4 motions to intervene. My only excuse, and I hope the
5 Court accepts it, is that we're a small firm, to
6 paraphrase Daniel Webster, although there are some who
7 love us, and we been kind of preoccupied in the last
8 several days with this thing. We intend to get to the
9 motion to intervene case promptly.
10 Now, with regard to the particular statements that
11 my brother made a few moments ago, he really begs the
12 question. He says on the one hand that the settlement
13 violates Rhode Island law, and I'm going to propose,
14 unfortunately, in a tedious way to show you why we
15 believe it's completely in compliance with Rhode Island
16 law. I also want to point out the startling statement
17 that Mr. Dennington made about how we are urging that an
18 independent foundation be set up and now we're talking
19 about CCB being connected with it. As recently as
20 September 28th CharterCare Foundation put in a correction
21 to its objections and I think it sheds some light to the
22 point we're talking about.
23 Originally, your Honor will recall, that Mr. Conn,
24 on behalf of the CharterCare Foundation, handed up to
25 your Honor a statute which indeed called for an

1 independent foundation. And then he pointed out that
2 that statute was not adhered to in any way, shape, or
3 form because it required the presiding judge to select
4 the board of directors to agree to the form of the
5 articles of the association, the bylaws, the statute
6 required a meeting, a public hearing, within a 180 days
7 and a public hearing every six months thereafter.
8 So, astonishingly, after Mr. Dennington stands up
9 and says I made the admission about an independent
10 situation that has to exist, he says in his latest
11 submission, I'll read his footnote on page seven. "That
12 sentence disposes of the Receiver's newly threatened
13 claim that CCF's Board of Directors is comprised of
14 usurpers because the presiding justice of the Superior
15 Court did not appoint those directors pursuant to Rhode
16 Island General Laws," and then cites them.
17 "That issue (or more accurately, non-issue) came up
18 during the September 7, 2018, hearing to consider whether
19 CCF, the Attorney General, and Prospect should have
20 additional time to brief their objections to the
21 settlement petition. During that hearing, the CCF's
22 counsel handed this Court a copy of Rhode Island General
23 Laws 23-17.14-22 to illustrate how the HCA required CCF
24 to be an independent entity, free of CCCB's control.
25 Upon further review of the A.G.'s HCA approval and the

1 statute itself, it is now clear to CCF's counsel that the
2 Attorney General correctly determined that that statute
3 did not apply." He then goes on to say, however, the
4 Attorney General's decision required independence.
5 Now, the problem with that is, we address that in
6 detail, where the Attorney General has specifically laid
7 out, and we will get to this in a moment, those things
8 that he objects to regarding our settlement with CCF, and
9 he specifically points to three items, which I think you
10 will see as a matter of law do not apply, that the
11 argument is simply wrong.
12 A couple of other points, this issue of violating
13 law, the case that my brother relies on is absolutely a
14 correct case. There was no question that the settlement
15 they were asking the Court to approve represented an
16 agreement with the settling parties that he would provide
17 favorable testimony in the trial and would get a release
18 for that. Now, you know, maybe the government can do
19 that in plea bargaining, but private individuals cannot
20 do that and there is a specific federal statute that
21 makes it a crime. So that was very simple to say we're
22 not going to enforce that agreement because it would
23 enforce a criminal act. There is nothing remotely like
24 this. This issue about whether or not we're entitled to
25 do what we're claiming to do is completely either up in

1 the air or in our favor.

2 And I would like to point out -- two things I want

3 to mention. Some issue came up about using up the

4 assets of the settling defendants if the case doesn't

5 settle and the answer is that the prudent lawyers that

6 they are, Messore, Land, and Fine, who is here in court,

7 once we sue them, this goes back to June, I sent the

8 complaint to the insurance company who told them, as

9 insurance companies are known to do, good luck, we're not

10 covering. So they have been defending this thing, and I

11 believe, frankly, that the insurance company is correct

12 and that there is no coverage.

13 Now, it's also important to understand in the

14 context of this case that we're attempting to settle with

15 three entities, the CharterCare Community Board, and its

16 subsidiaries, the old Roger William's Hospital, so-called

17 Heritage Hospital, and the old St. Joseph's Hospital,

18 sometimes called Fatima. Those three entities since the

19 conversion have been under completely new management and

20 have been guided by Mr. Fine and Mr. Land as counsel.

21 They have examined the facts now, after we brought the

22 suit and seen our discovery and they, new folks, have

23 decided it's time to get out of dodge. So that is

24 something to bear in mind here.

25 I want to address the issue of the relationship

1 between CCB, that is the CharterCare Community Board, one
2 of the settling Defendants, and the proposed assignment
3 to the Receiver of whatever rights CCB has in CharterCare
4 Foundation. Now, first I want to say CCB is definitively
5 the sole member of the nonprofit corporation CC
6 Foundation, which was formerly known as CharterCare
7 Health Partners Foundation, and that was the case, your
8 Honor, even before the Cy Pres in 2015. That foundation
9 held at that time a measly sum of money compared to what
10 we are talking about today, something like $200,000.
11 Now, in the federal case corporations are required
12 to make corporate disclosure statements and they did do
13 that in the federal case, and I quote what CC CharterCare
14 Foundation said to Defendants. They said, "On August 25,
15 2011, CharterCare Foundation filed with the Rhode Island
16 Secretary of State's Office Articles of Amendment to
17 CCF's Articles of Incorporation stating in relevant part
18 that CCB was CCF's sole member. No amendment to that
19 portion of CCF's Articles of Incorporation has been
20 found. CCF contends, however, that it has functioned in
21 benefit of CCB for the last three to four years."
22 Now, that relates, your Honor, to the claim they are
23 making that even though the law requires the articles of
24 association to show the members, they're saying that CCB
25 has abandoned its rights, has walked away from them, has

1 not been involved.

2 But then before this Court, in the submissions made

3 to this Court in their objection on page two of one they

4 say the following about this abandonment issue, "CCF

5 acknowledges, however, that this receivership action is

6 not the proper forum in which the parties should be

7 litigating the merits of the abandonment issue. CCF

8 intends to litigate that issue in a separate forum." So

9 what we have is a matter of record the sole member is CCB

10 and a statement that they have the theory of abandonment,

11 which we addressed previously we think is without merit.

12 They themselves are saying this is not the place to argue

13 this.

14 Now, on the conversion, the decision of the Attorney

15 General, on March 16, 2014, he said on page 29 and I

16 quote, "Subsequent to and as part of the CCHP

17 affiliation, on August 25, 2011, the organizational

18 documents of St. Joseph's Foundation were revised to

19 change its name to CharterCare Health Partners Foundation

20 and to make CCHP its sole member." CharterCare Health

21 Partners Foundation had a subsequent name change.

22 So here we are the Attorney General is saying eight

23 months later, your Honor, in January -- by the way, I

24 want to go back. The submission to the Federal Court was

25 on September 20, 2018. It's not exactly an ancient

1 declaration. In any event, the Cy Pres petition that
2 your Honor heard was filed on January 13th of 2015, and
3 in that petition given to the Court the very first
4 paragraph said CharterCare Health Partners Foundation's
5 sole member is CharterCare Community Board formerly known
6 as CharterCare Health Partners. In the fourth paragraph
7 of the same petition they gave your Honor they said
8 CharterCare Board is a Rhode Island 501(c)3 nonprofit and
9 the sole member of the CCHP Foundation. The Attorney
10 General filed his reply to the petition on April 1, 2015,
11 made no comment, didn't contradict that, et cetera.
12 Now, we get to the question is the membership
13 assignable? And, by the way, I apologize for this
14 nitty-gritty analysis, which I don't really think is
15 before the Court but I feel compelled to get into.
16 THE COURT: I understand. If you can just try and
17 --
18 MR. WISTOW: I'll try to. Is membership assignable?
19 The answer is yes because the only entities that are
20 allowed to amend the bylaws under these circumstances is
21 CCB and the settlement expressly provides that within
22 five days of the effective date, meaning when hopefully
23 the Federal Court approves the settlement, there will be
24 an amendment to the by-laws allowing the assignment. It
25 is our position, Judge, that the bylaws that prohibit the

1 assignment were done by what we call the usurping
2 directors that were improperly appointed.
3 Now, the Receiver ultimately will get, if the
4 settlement goes through in both these courts, the plan is
5 just what they're saying. The Receiver we will get CCB's
6 rights. The Receiver will act lawfully or what he thinks
7 is lawfully. He will bring stuff before this Court
8 before we do anything. There will be notice to them. If
9 they read the settlement agreement carefully, it
10 expressly says they are going to get notice.
11 We still need to prove our claims. We have two
12 different issues here. We have the claims of the
13 Receiver and the planned members, qua Receiver plan
14 members, saying they never got notice of the Cy Pres,
15 there were misrepresentations made, et cetera, et cetera.
16 What we're trying to get here, frankly, is the second
17 theory of recovery where we don't even -- I'm not saying
18 we won't get into the other one. We have two disparate
19 theories of why the money should come to us. And one of
20 those possible resolutions would be to put the foundation
21 into judicial liquidation, which by its very name means
22 that it will be court supervised.
23 Now, our position, and I want to get into this very
24 deeply, is that these charitable funds are subject to a
25 statute in Rhode Island which specifically says that when

1 you liquidate a nonprofit, you first pay your creditors
2 any administrative costs and then you go to the
3 charitable aspects of it. I heard somebody say how would
4 it be if somebody made a charitable gift to a museum and
5 then there was a bankruptcy and somebody fixed the roof
6 that protected the paintings, he can't get any of the
7 money. And there is a lot of law on this and I'm not
8 going to ask your Honor to decide it.
9 Now, on page five of the A.G.'s objection to our
10 request for settlement, and, by the way, the A.G., as
11 your Honor has noticed, really is not involving himself
12 in anything in the objection except the CharterCare
13 Foundation.
14 THE COURT: And I think that would be better kept in
15 her response.
16 MR. WISTOW: Fine. But there is something Mr.
17 Dennington said that I can't let go without commenting.
18 He said that all of the people here, all they're
19 interested in is the $12 million going into the fund. My
20 response is very simple. Of course, they're interested
21 in that, but they are not only interested in that.
22 They're interested in the 15 percent ownership interest
23 in Prospect CharterCare which by Prospect CharterCare's
24 own financial statement is worth about $16 million. That
25 number is up in the air, but it's not fair to say that

1 these people are just looking for the $12 million.
2 The documents that we believe enable us to do what
3 we are attempting to do were all approved by the Attorney
4 General without exception. Now, what we're having here
5 is in 2015 at that time $8.2 million went to a
6 preexisting foundation. It was controlled by a
7 transacting party, CCB. The A.G. and CCF bypassed the
8 presiding justice to select directors, bypassed the
9 presiding judge to approve modification, and basically
10 allowed people with no authority to amend the bylaws.
11 Now, what is the substantive problem we are really
12 addressing here? When one looks back at the transaction
13 in 2014, really the parties on the selling end was CCB,
14 which was the member that owned the two old hospitals and
15 some other assets. It was a holding entity essentially.
16 So the transaction ends up where the underlying
17 hospitals, which had creditors, doesn't get the 15
18 percent. The 15 percent goes to the holding company. To
19 make a very homely example of what they did, it's as if a
20 shareholder, one shareholder, owned a laundromat and the
21 machines in the laundromat were worth $100,000, fair
22 market value but the corporation --
23 THE COURT: I am trying to keep this as brief
24 possible.
25 MR. WISTOW: Forgive me, your Honor. I'm trying to

1 eliminate whatever I can. It's painful, your Honor. I
2 spent so much time doing this but I think you're right.
3 I think I'm getting into too much detail.
4 On the issue of whether or not the transfer of the
5 15 percent violates the LLC agreement, that really is an
6 issue of somebody else. So I will subside, your Honor.
7 Thank you.
8 THE COURT: Thank you very much.
9 MR. DENNINGTON: Your Honor, I would like to briefly
10 respond. I promise I will be 90 seconds.
11 THE COURT: You got a minute. Go ahead.
12 MR. DENNINGTON: Okay. Three points. On the
13 corporate independence issue, I think the quick answer is
14 this is not being litigated here, but from our
15 standpoint, as CharterCare Foundation's counsel, where we
16 have a challenge with the paperwork but we don't have a
17 challenge with the intent. And the Receiver is not going
18 to have any evidence that CharterCare Community Board
19 actually ever engaged in conduct control oversight, which
20 is consistent with the claim to CharterCare Foundation.
21 Second, another reason why you should not go into
22 the Section 32 HCA standing issue, let's turn that around
23 on them. What standing do they have to complain that the
24 presiding justice of the Superior Court didn't appoint
25 the directors four years earlier? How would that have

1 led to any different result in this case?
2 And, third, it doesn't matter who is on
3 CharterCare's Foundation Board -- I'm sorry. Whether
4 it's Attorney Violet or any other attorney in this room,
5 any person. That person cannot assign in a revokable
6 assignment of CharterCare Foundation's charitable assets
7 to the Receiver at least without permission from the
8 Rhode Island Attorney General and that is a condition you
9 want to consider, which is conditioning the approval of
10 that portion of the settlement upon the prior express
11 permission of the Rhode Island Attorney General.
12 THE COURT: Thank you. I think it makes sense now
13 to hear from the Attorney General. Before we start, I
14 did get your reply. I want to thank you very much for
15 the Attorney General's clarification about the
16 administrative ability.
17 Ms. ZURIER: You're welcome, your Honor. I think I
18 can still say good morning.
19 THE COURT: You've still got two more minutes.
20 MS. ZURIER: My focus this morning is going to be on
21 what the Receiver has indicated is his ultimate goal
22 whether to what extent and if so how the Receiver can add
23 the $8 million of CharterCare Foundation's assets to the
24 estate for the benefit of the pensioner. In terms of
25 standing, the fact that the Receiver recently moved to

1 vacate the Cy Pres order from 2015, I think makes it
2 abundantly clear that the Attorney General has standing
3 in the context of our charitable trust powers. We
4 appreciate that it would be very useful to the Receiver
5 to rely on the Foundation's assets to help satisfy the
6 pensioners' claims. But, by the same token, we do have
7 the responsibility for ensuring that the intentions of
8 the many donors who entrusted their assets to the
9 hospital predecessors are honored. Donors gave their
10 money in order to finance cancer research and continuing
11 medical education. The public has benefitted from their
12 generosity and their interests should be considered in
13 this proceeding as well.
14 And, actually, that brings me to the next point I
15 wanted to make which is why decide any of this now? The
16 best interest of the receivership should also include a
17 consideration of legality. There has already been a
18 motion to vacate the Cy Pres order. It is abundantly
19 clear that that is moving forward. It started before
20 this Court had even approved the settlement. Every
21 moment, every month that goes by, where the Foundation
22 cannot act as a charitable foundation and follow the
23 donors' instructions is causing harm to the donors'
24 intent and to the public it benefitted. Therefore, we
25 would like to have a decision about that intent now

1 rather than waiting until some future proceeding several
2 years down the line when the issue concerning the status
3 of those assets is determined. As I said, the illegality
4 is created in our view because right now what they're
5 doing violates a still existing order of this Court and
6 we assume that the outcome of the motion to vacate is not
7 predetermined.
8 Now, why is there a need for a Cy Pres proceeding
9 now? We have been cut out of the loop on much of this
10 prior litigation. As a matter of fact, someone told me
11 this morning that there was an amended complaint filed in
12 Federal Court Friday. We did not get a copy. We were
13 not participating in the phone conference that was held
14 several weeks ago. And because of all of this we had to
15 kind of play catchup. In our view it would make a lot
16 more sense to have to resolve the Cy Pres issue first so
17 you know how much money you're actually dealing with than
18 to implement settlement and have all the issues regarding
19 donated intent and whether those assets are, in fact,
20 part of the estate for purposes of any dissolution that
21 might occur, to have all of that resolved perhaps several
22 years down the road.
23 In 2015 our office and Bank of America trustee took
24 a very careful look at thousands of pages of
25 documentation regarding the donated intent of the $8

1 million in funds. And it's important to remember that
2 you keep talking about $8 million, but from the point of
3 view of the charitable trust doctrine, it's a series of
4 discrete funds, each of which has a separate restriction.
5 Some of those restrictions are more specific and the
6 Attorney General believes could not ever be transferred
7 to the Receiver for the same reasons that they weren't
8 transferred to the hospitals in the course of the windup
9 four years ago. Other assets may have restrictions that
10 because they're a more general expression of donated
11 intent, arguments can be made in other states, like New
12 York have been made, to allow some of those funds to be
13 used for the benefit of creditor's like the pensioners.
14 But without knowing how much money you're talking about
15 it's all of a very theoretical discussion and impossible
16 to really know how the rest of the litigation and the
17 other claims might play out.
18 As for the argument about the dissolution of a
19 nonprofit corporation, I recognize that 7-6-51 and 7-6-61
20 both appear to prioritize creditors' rights above those
21 of the charitable trust donors. However, there is a
22 split in the law. And New York, which has a great many
23 foundations, has a similar statute and actually
24 prioritizes donative intent based upon an analysis of the
25 law that goes beyond merely looking at the nonprofit

1 corporation statute, which after all is applicable not
2 just to charitable trust organizations like the
3 Foundation, but also to things like the University Club
4 and Agawam Hunt, which wouldn't have the same charitable
5 trust implications from our office's perspectives.
6 So those decisions are premature to make now because
7 the dissolution action hasn't been brought. They could
8 possibly be explored in a Cy Pres proceeding because this
9 Court would then be in a position to examine which assets
10 are potentially part of the receivership estate
11 dissolution and which are not. But, again, to talk in
12 one lump sum without discerning donor intent is really
13 difficult and abstract and doesn't do the Foundation or
14 any other party to this proceeding any good.
15 THE COURT: Just a question, I'm trying to
16 understand the prejudice if this issue is dealt with down
17 the road. There is agreement, as you know, between the
18 Receiver and CharterCare Foundation where the four, four
19 and a half percent of money is still being distributed so
20 that is going forward. So I just want to make sure
21 you're not thinking that nothing is happening.
22 MS. ZURIER: I think there is some money being
23 distributed, but the whole scope of the donors' intent is
24 not being furthered. When you couple that with the
25 possibility that some of those assets are going to be

1 expended in tortuous litigation for several years, I
2 think on balance it makes sense to decide the scope of
3 the corpus now and then deal with the settlement. Rather
4 than deal with the settlement and then watch what we all
5 know is going to take place. We'll be in here in a
6 Cy Pres proceeding and we'll be in Federal Court in a
7 Cy Pres proceeding. We all know where that is going. It
8 just doesn't make sense and I don't think it's legal
9 given the current 2015 order that is in place for the
10 Court to condone a settlement that seems to be in clear
11 violation of that order.
12 THE COURT: I'm just trying to understand what is in
13 clear violation of that order if ultimately what the
14 Receiver is saying happened? But aren't there a lot of
15 steps before we get there?
16 MS. ZURIER: Some of them seem to have occurred
17 despite the fact that the Court hasn't approved the
18 settlement. The settlement required a motion to vacate
19 be filed after the settlement is approved. The motion
20 has already been filed. You can accept the Receiver's
21 contention at face value that this is all theoretical but
22 I think we're all fooling ourselves.
23 Finally, I want to address the remarks of the
24 Receiver concerning the Hospital Conversion statute and
25 how it was the Attorney General's intention to freeze the

1 status of the parties as of 2014 with respect to the
2 conditions that were issued as part of this decision
3 approving the conversion. As the Attorney General has
4 made clear in its papers, the statute empowered us to
5 impose conditions on a for-profit hospital conversion in
6 order to preserve the integrity of the transaction after
7 the office approves it and those conditions lasted for
8 three years. It's interesting that we are only here now
9 because some of the three-year conditions that would have
10 absolutely prevented the settlement agreement from
11 occurring have expired.
12 THE COURT: But that was the Attorney General's
13 choice. You could have limited it to ten years.
14 MS. ZURIER: Absolutely, and I'm not saying that the
15 conditions should have been different. All I'm trying to
16 point out is we're being accused of a power grab. We're
17 being accused of trying to grab access for private
18 parties. No. What we were doing is implementing the
19 provision of the Hospital Conversion Act that the General
20 Assembly past and gave us the power to do.
21 And my biggest problem with the Receiver's argument
22 is there is an awful lot of assumptions about the motive
23 and intent on the part of the Attorney General as well as
24 some of the other parties here, but none of that is
25 demonstrated with actual facts. And I would hope that

1 the Court would keep that in mind in terms of deciding
2 the good faith nature of the settlement and whether other
3 issues need to be addressed first. So if the Court has
4 any questions.
5 THE COURT: So are you suggesting, because it wasn't
6 in your papers, that the Court should be making a
7 determination under the joint tortfeasor law whether or
8 not this settlement should be approved?
9 MS. ZURIER: No, the Attorney General is suggesting
10 that it makes more sense to have a Cy Pres proceeding
11 first and figure out what assets are available and what
12 the donors' intent are. How much of the potential money
13 is in the pot and what it can be used for before
14 continuing to implement the remainder of the settlement.
15 THE COURT: I just want to say there is fact, there
16 is the law, and there is commentary. And the Court with
17 respect to this proceeding understands there is some
18 commentary made about the Attorney General's office and
19 actions and that is very easy to put aside. Just like I
20 assume your comment about the Court predetermining
21 anything is taken in the same way. Certainly, just as
22 you took offense, certainly the Court can take offense to
23 your suggestion.
24 MS. ZURIER: I apologize, your Honor.
25 THE COURT: Your apology is accepted.

1 MS. ZURIER: I did not mean to imply that the Court
2 had predetermined.
3 THE COURT: Thank you very much.
4 MR. WISTOW: I want to correct an unintentional
5 misstatement. The settlement agreement did not provide
6 for us to file a motion to intervene. We filed the
7 motion to intervene long before the settlement agreement
8 was in place. If you look at the settlement agreement,
9 you will not find where we are agreeing to file a motion
10 to intervene. What I think my sister is referring to is
11 the fact that the settling parties agree not to object in
12 that intervention which I see nothing wrong with.
13 Let me say very briefly, the New York statute that
14 my sister is talking about is completely different from
15 the Rhode Island statute. I think your Honor will
16 probably recall that when CharterCare Foundation put its
17 brief in, it went out of its way to say the Rhode Island
18 statute is a relic. That only 15 other statutes adhere
19 to what Rhode Island does and New York has the more
20 modern view. Well, we still are courts, not legislature,
21 and that may be the strongest argument I have heard in my
22 favor. There is only 14 other states that follow Rhode
23 Island. New York is different. My sister says we
24 waited three years before we did this. I would like to
25 remind the Court -- well, I don't have to remind the

1 Court. The Court knows that after the three years were
2 up, the three years would have been June, 2017. The
3 petition for the receivership came after that so we don't
4 feel guilty that we sat about.
5 Now, the arguments of the A.G. are given to you at
6 30,000 feet. Here is what they actually said were our
7 violations and they are on page 60 of our reply. They
8 come from the argument of the Attorney General.
9 "1. There shall be no board or officer overlap
10 between or among the CCHP Foundation, CCHP, and Heritage
11 Hospitals." There is not and there will be not under our
12 proposal.
13 The second one, "There should be no board or officer
14 overlap between or among the Prospect entities and the
15 CCHP Foundation, the CCHP and the Heritage Hospitals."
16 There is not and there will be not. Those two conditions
17 that he said were violated, they simply don't if they
18 read the settlement carefully.
19 Finally, the last objection I don't know how to
20 address. It says, "That the transaction be implemented
21 as outlined in the initial application including all
22 exhibits and supplemental responses." We believe we've
23 done that. Your Honor knows there are hundreds and
24 hundreds and hundreds of pages. We believe we have
25 complied completely. And your Honor also knows and

1 correctly pointed out, in the interim the Foundation by
2 agreement, which became an order, is able to fund 4.5
3 percent of its charitable assets. And, by the way, I can
4 tell you is currently being defended by a commercial
5 insurance company. Thank you, your Honor.
6 THE COURT: Thank you. Next, we are going to move
7 on to Prospect. Counsel.
8 MR. HALPERIN: Good afternoon, your Honor.
9 THE COURT: Good afternoon.
10 MR. HALPERIN: Preston Halperin for the Prospect
11 entities. Your Honor, I know the hour is getting late
12 and I'm sure everyone is getting tired and hungry. I
13 would ask that you permit me to just go through this. I
14 will be as brief as I can.
15 THE COURT: Absolutely.
16 MR. HALPERIN: Your Honor, I am going to take a step
17 back. I come at this from a slightly different
18 prospective. I have been practicing before the Superior
19 Court in receivership actions for 20 years and I've
20 participated as counsel for Receivers and I have been at
21 all sides of the various transactions and party's
22 agreements. And in each case that I have been involved
23 in a settlement agreement has been reached when
24 appropriate by a Receiver. It might even be drafted.
25 It's often drafted. It might even be executed, but it's

1 always been presented to the Court for approval before it
2 becomes implemented. In this case it seems that the
3 Receiver is going in two different directions with the
4 same document. In the case of the Foundation, the
5 Receiver is saying we haven't gone forward yet. We're
6 going to give them notice and they will have an
7 opportunity to be heard.
8 In the case of the Prospect entities and the effect
9 with the Prospect CharterCare, LLC, agreement, it has
10 gone forward. It has actually taken the assignment. It
11 has actually received the security interest and it has
12 filed a uniform UCC-1 financial statement. That is
13 different than reaching an agreement and seeking court
14 approval. That is an injury right now to the Prospect
15 East entity, which is a party to the LLC agreement as
16 well as to the Prospect CharterCare, LLC entity, which
17 is, obviously, the subject of the LLC agreement.
18 I know the Court is well aware of this, but it needs
19 to be said, and we said it right at the outset, that the
20 Prospect entities have absolutely no issue with the money
21 that might be in the hands of CCCB going to the pension
22 holders. As everyone is aware, the Prospect entities
23 came on the scene in 2014. At which time it has been
24 acknowledged in the Receiver's complaint that the pension
25 plan was already willfully under funded. I'm not going

1 to get into the merits of the case at all. Obviously,
2 that is for another day, but the receivership proceeding
3 is something that is involved, as the Court knows, mostly
4 in the last 20 plus years. We don't have a rule book to
5 go to as to exactly how we do things in receivership
6 court.
7 My experience is the reason why this process is so
8 successful is that interested parties have always been
9 heard and the courts have always been respectful of the
10 rights of third parties and would not authorize, direct,
11 or permit a Receiver to trample those rights without
12 there being a fair opportunity to be heard. This is a
13 fair opportunity to be heard and we very much appreciate
14 that. However, the Receiver went forward without that
15 fair opportunity to be heard on whether or not it was
16 appropriate to take the CCCB assignment and put the
17 security interest in place and that is not particularly
18 the way things have been done over my 20-years experience
19 with this Court.
20 The Receiver is attempting to act as I would suggest
21 a private litigant might with very aggressive strong-arm
22 tactics to win at any cost to bring money into the
23 estate, and while that sort of approach may become
24 appropriate in private litigation, that is not typically
25 what the Receiver does. And the reason why I don't think

1 it's appropriate, your Honor, is because the Receiver is
2 acting as an instrument of the Court. The Receiver is
3 not a private litigant. In the end the Receiver takes
4 his direction from the Court. So whatever the Court
5 thinks is appropriate and fair and reasonable is what the
6 direction is going to be to the Receiver.
7 So here you have a Receiver who is saying to the
8 Court I think it's appropriate to go ahead and
9 essentially breach an agreement that has contractural
10 provisions, the LLC agreement, and disregard those
11 provisions and saying to the Court it's okay because that
12 can be litigated at another day. That may be true but
13 that doesn't mean it's what the Court would like to do
14 knowing that there is an LLC agreement out there, knowing
15 that they're clear anti-transfer provisions.
16 I know we are not going to get into the merits of
17 it. I'll just give you two sentences. My brother is
18 going to stand up and say that the assignment is
19 perfectly valid.
20 THE COURT: It's in their papers.
21 MR. HALPERIN: There is one thing I want to add to
22 that. We did not do a reply. If your Honor looks at
23 Sections 13.1 of the LLC agreement, even that sort of
24 assignment or transfer to the affiliates requires the
25 approval in form and substance of the manager of the LLC

1 and the opinion of counsel. Clearly we don't have those
2 things. Clearly that agreement has not been complied
3 with.
4 Now, the question has come up how can this go
5 forward and what should happen. I would suggest to the
6 Court that if the Receiver were to come to the Court with
7 an independent petition to go ahead and take the
8 assignment of the interest of CCCB and to attempt to step
9 into the shoes as a voting member of CharterCare LLC, the
10 Court would look at that independently and would decide
11 whether or not based on the provision of the LLC, based
12 upon the impact of that, that would be an appropriate
13 direction for the Receiver to have the Court's
14 permission. And I think if that were an isolated
15 transaction, I think the Court would say the agreement is
16 what it is. There are provisions for resolving it.
17 Venue in that agreement is Delaware and if, in fact,
18 there is going to be a dispute as to whether or not the
19 CCCB can transfer its interest, that is between CCCB
20 whether it's the Receiver in its shoes or CCCB and
21 Prospect and that is something that can be litigated
22 under the terms of that agreement in Delaware.
23 The question for the Court is do you, your Honor,
24 want to set in motion all of these lawsuits without
25 regard to whether or not they are likely to succeed,

1 whether or not on their face they present problems that
2 the Receivership should not be involved in simply giving
3 the Receiver's counsel carte blanche to just launch these
4 proceedings. There is a domino affect here. It's not
5 just about putting money into the pension plan, which we
6 understand and support. It's about what will happen
7 next.
8 And if this settlement is permitted to go forward,
9 what will happen is that the board of the Prospect
10 CharterCare, LLC is now 50 percent comprised of the CCCB
11 members will be essentially controlled by the Receiver
12 and those directors will create havoc. There would be a
13 deadlock. There will be effective change of control
14 issues that need to go in front of our regulators. This
15 will put in motion problems that will affect the
16 operations of the hospital.
17 That is a very significant concern and one that I
18 don't think the Court should simply take the approach of
19 we will kick that can down the road. We know that is
20 what their game plan is. They want to create that
21 deadlock or that impasse. They want to use that court
22 authority, that power, which would come solely from the
23 settlement in order to leverage a settlement that is the
24 subject of litigation. That is the reason why the Court
25 should not approve this because these are questions that

1 need to be litigated before they happen, not after they
2 happen, and it isn't in my view something that the Court
3 should support to give that sort of unfettered authority
4 to a Receiver as opposed to a private litigant who has
5 the right to file papers and then you have an adversary
6 proceeding.
7 In previous receiverships all the parties had worked
8 in a collaborative way as possible to achieve a result,
9 and I can remember cases from the A.G. and the Department
10 of Health were regularly at the table. There is a way to
11 achieve the result that is being sought here and there is
12 a process to get to that result. But giving the Receiver
13 the authority to implement the settlement that the A.G.
14 says has issues, the Foundation says has issues, that the
15 Prospect entities say has issues that can be read by
16 looking at the LLC agreement, I would suggest is not the
17 appropriate way for this receivership to proceed. There
18 are evidentiary issues that have to be heard. We can't
19 resolve any of those here.
20 I would ask that the Court take this a step at a
21 time and if the Court is inclined to go ahead and approve
22 the settlement, I have no doubt that the CCB parties will
23 agree to virtually any settlement that the Receiver
24 approves as evidenced by what they have already agreed
25 to. I think the suggestion that the Court deny the

1 settlement or doesn't approve it, you're going to not
2 have a settlement is really disingenuous at best. The
3 settlement in my view as presently prepared is in excess
4 of the authority of the Receiver.
5 And I point out the fact that when the Court entered
6 the permanent order appointing the Receiver, it
7 specifically said on October 27, 2017, "Wistow Sheehan &
8 Lovely have the authority to litigate and settle claims
9 against third parties 'related to the prior management
10 administration and oversight of the retirement plan.'" I
11 don't know that the Court envisioned that authority
12 extending to invading charitable assets of the Foundation
13 or taking on provisions of an LLC agreement or any of the
14 assignments that are in place that affects the rights of
15 these third parties. They go well beyond management,
16 oversight, and administration of the plan.
17 The Receiver says there is a provision in the
18 agreement that if the settlement is not approved, the
19 parties are going to return to the respective provisions.
20 As I said earlier, your Honor, that is essentially like
21 saying we are going to unring this bell. There's already
22 been assignment. There has already been surety interest.
23 We're going to go ahead and we're going to undo that.
24 That is not the way the Receivership should be
25 proceeding. I think it's bad precedent as well as bad

1 policy.

2 I am definitely not going to address any of the

3 substantive issues that the Attorney General raised

4 although I understand their point and I agree with it.

5 Your Honor, regarding the question of the applicability

6 of the special statute, I'd like to address that. We

7 don't have the litigation before the Court that is being

8 settled. We don't have the complaints. There is another

9 civil action that's been stayed, but in this Receivership

10 action we don't have those pleadings. So I do feel that

11 the ultimate decision on whether or not that is collusive

12 or whether or not it's in good faith should lie with

13 Judge Smith when he approves or doesn't approve the

14 settlement.

15 However, I do think it is extremely appropriate for

16 the Court to be aware of and to look at that statute

17 because the Court would not want to knowingly approve or

18 direct his Receiver to enter into an agreement that on

19 its face appears to the Court to include collusive

20 statements, and Mr. Wistow says there is nothing

21 collusive about it. Well, it's certainly unique for a

22 party settling a case to admit that the damages are $125

23 million and to be part of the group that actually was the

24 employer in this case and had the responsibility for

25 multiple years of dealing with this retirement plan to

1 make a statement in the settlement agreement that they
2 have a small part of the liability. To me that shouts
3 out for some sort of attempt to gain an advantage for
4 collusion. If the Court agrees with that, the Court
5 should perhaps consider directing the Receiver to remove
6 those provisions because the Court has the ultimate
7 decision making control, not the Receiver and not the
8 Receiver's counsel.
9 I think this is a settlement that should go through
10 and can go through, but I think it should go through in a
11 way that respects the various rights of all of the
12 parties and at this juncture I think that personally that
13 should be limited to dealing with the financial
14 consideration. Anything else that the Receiver wants to
15 do, the Receiver should come back to court with a
16 petition and allow the parties to be heard and by that
17 time there may already be a lawsuit pending in Delaware
18 to deal with the LLC agreement, and the Court will see
19 that get litigated in Delaware and await the outcome of
20 that where there may be an administrative proceeding.
21 So it's premature to know exactly how this all
22 unfolds, but I say don't give the Receiver carte blanche
23 to start reeking havoc on the rights of third parties and
24 diminishing the assets of this receivership estate by
25 keeping the Receiver involved in running up expenses that

1 don't need to be run up at this point in time from the
2 point of view of this receivership. Embroiling the
3 receivership in litigation which you know is going to
4 happen may not be in the best interest of the
5 receivership estate.
6 The last thing I want to say, your Honor, and this
7 has a place in my view, is that the Court is obviously
8 concerned with the receivership estate, with the interest
9 of the pension holders, and rightfully so, but there is
10 also precedent for the Court taking into consideration
11 the public interest when a hospital is involved. And,
12 here, I'm sure your Honor is familiar when Judge
13 Silverstein wrote in May, 2010, in the Landmark Hospital
14 case you have to balance the interest of the parties. In
15 that case he was dealing with competing bids for the
16 hospital.
17 Here, you have a hospital that is operating and
18 serving the community and have a Receiver who is
19 attempting to interfere with the voting operation of that
20 hospital in order to gain a tactical advantage. There is
21 no telling what that may do but the public interest will
22 be harmed should that happen. I would ask the Court no
23 matter what happens here to really keep very, very close
24 reigns on something that could impact the control of the
25 operating hospitals here in Rhode Island.

1 THE COURT: If this does not take place and there
2 was no settlement agreement, wouldn't everything you're
3 talking about be done by the current 15 percent owner?
4 MR. HALPERIN: The current 15 percent owner could
5 make changes, but there are fiduciary duties that govern
6 directors and the director is to the Prospect CharterCare
7 entity. Should they or even the Receiver's appointees
8 take action that would be inconsistent, such as trying to
9 enforce a deadlock in order to create a dissolution or
10 whatever the case may be, they may be in a position to
11 potentially violate the fiduciary duty in order to
12 benefit the pension plan.
13 THE COURT: Didn't you just answer your own
14 question?
15 MR. HALPERIN: That it could happen, but it hasn't
16 happened because they have a fiduciary duty. They are
17 trying to step away and get into it by the Court
18 authorizing the Receiver to essentially go at it and I
19 don't think that's what the Court should do under the
20 circumstances. They haven't done that for good reason
21 because it would be a breach of their duty if they did
22 that, your Honor.
23 THE COURT: Thank you very much.
24 MR. HALPERIN: Thank you.
25 MR. WISTOW: I have known Mr. Halperin for many

1 years and I know he would never intentionally misstate
2 any facts to the Court. He has unintentionally done so.
3 The transfer we are talking about now do not require the
4 approval of the 900 or the majority of the board. If
5 your Honor reads very simply what we have put forward,
6 generally speaking, he's right. By the way, that is part
7 of the -- we are going to get into this once we have the
8 trial, but this 15 percent ownership is so illusory. In
9 most cases the 15 percent owner, who is supposed to have
10 15 percent voting, can't do anything he would like in
11 most instances. This particular situation is a permitted
12 transfer. If you read 13.1 and 13.1 says -- it's in all
13 our papers. It says, "Unless otherwise provided you
14 can't make the transfer." But 13.2 allows permitted
15 transfers and it says, "Not withstanding the restrictions
16 in 13.1 the following transfers are permitted and shall
17 not be deemed to violate the restrictions in Section
18 13.1."
19 Now, that transfers by a member to one or more of
20 its affiliates, et cetera, and we've made extensive
21 arguments and I'm not going to rehearse why we are
22 technically an affiliate. By the way, your Honor, as to
23 whether or not we're an affiliate, I really want to hand
24 something up to your Honor. This was attached, your
25 Honor, as part of CharterCare's objection to the

1 settlement and it's the petition for declaratory order
2 that they filed with the Attorney General on September
3 27th. It is in this case because they filed it as an
4 exhibit. I would like to hand it up to your Honor.
5 (Document handed to the Court and counsel.)
6 And I would just like to add this question of are we
7 an affiliate to whom the transfer is permitted.
8 Paragraph 23, what I have done, your Honor, is I haven't
9 given you the entire file.
10 THE COURT: This is Exhibit B on Prospect's
11 objection.
12 MR. WISTOW: That's right. Thank you. Paragraph
13 23. This is what Prospect has said some days ago, "It is
14 beyond dispute that the receivership estate is SJHSRI in
15 its role as plan administrator. Therefore, the plan
16 administrator is by plan definition SJHSRI. Under Rhode
17 Island law, the receivership estate stands in the shoes
18 of SJHSRI." Now, I tell you there is no question that
19 CCB is an affiliate of St. Joseph's Hospital and this
20 just amplifies the argument that we made.
21 Paragraph 71 of that same petition, these are the
22 statements of Prospect CharterCare. "It is beyond
23 dispute that there is an identity of parties between the
24 conversion and CEC proceedings and the Federal Court
25 litigation in that the Acquiror, which is Prospect

1 CharterCare, and the receivership estate were both
2 transacting parties in the conversion and CEC
3 proceedings."
4 If that doesn't clinch you at least to what they
5 think an affiliate is, I don't know what it is. I'm not
6 going to go through the convoluted argument as to why we
7 are affiliates. I will rely on what was said.
8 Now, a couple of things, your Honor. We had the
9 temerity to sign a binding settlement agreement. I have
10 two justifications for that. The first is the order that
11 your Honor entered paragraph five, "The said Receiver B
12 is hereby authorized, empowered, and directed to take
13 control, possession, and charge of said respondent and
14 his assets wherever located and manage and continue the
15 administration and oversee the respondent and to
16 reasonably preserve the same and is hereby vested with
17 title to the same, to collect and receive the debts,
18 property, and other assets of said respondent" -- here it
19 is -- "with full power to prosecute, defend, adjust, and
20 compromise all claims and suits of, by, against, or on
21 behalf of said respondent and to appear, intervene, and
22 become a party," et cetera.
23 He had express authority to do what he did. We all
24 said this is not a run-of-the-mill settlement. We owe it
25 to the Court to come in and say, here is what we have

1 done. If you want to undo it Judge Stern, it's up to you
2 to undo it. It's not unlike -- in fact, it's exactly
3 like the purchaser or seller of real estate entering into
4 a binding contract saying it's subject to the zoning
5 board of review. If the zoning board says no, provided
6 everybody acts in good faith to attempt to get the
7 approval, then you have the continuation of the binding
8 contract. If the zoning board says no, there is no
9 longer any contract. That's what our agreement provides.
10 I feel, and I hope your Honor agrees, we did not overstep
11 our bounds. We could theoretically have done this
12 without coming to you and gone straight to the Federal
13 Court. We didn't think it was prudent in this complex
14 situation to do that.
15 The whole business about the 15 percent, this is
16 very, very important to us. We have filed a motion to
17 adjudge in contempt. By the way, my brother just
18 signaled his thinking about bringing a lawsuit in
19 Delaware. You know, our motion to adjudge in contempt, I
20 actually wrote him a letter telling him ahead of time if
21 you want to sue us, if you want to do something to impair
22 the contract, which he acknowledges is a binding
23 contract.
24 THE COURT: I understand that. I also understand
25 that counsel has not had opportunity to respond to that

1 motion.

2 MR. WISTOW: I just want to emphasize I really think

3 it would be outrageous to not ask permission of this

4 Court to invalidate a contract in Delaware as he is

5 planning to do.

6 By the way, he says he has been a Receiver for many

7 years and this is absolutely unique to agree to damages.

8 I don't think I have ever been a Receiver, to be honest

9 with you. So I'm not going to talk about what is common

10 or uncommon in receiverships, but I have been involved in

11 I will say hundreds of settlements of contested cases and

12 it absolutely is common for a Defendant to agree to the

13 damages in a case so that it can be used by the

14 plaintiffs against non-settling Defendants or more

15 particularly against an insurance company. So maybe it's

16 unique in his experience. It's common in mine.

17 And, by the way, nobody is suggesting that that

18 admission by them is somehow binding on the other

19 Defendants. The fact of the matter is, Judge, I'm not

20 going to get into -- your Honor, has amply shown over the

21 time that I have been before you that you read the papers

22 carefully, and justifiably get a little short if I start

23 going over them in too much detail.

24 I do want to add this one point. This 13 percent --

25 15 percent is a huge deal because I can tell you as part

1 of the settlement process that we have been trying to get
2 through the 15 percent holder, CCB, an accounting of the
3 promised $50 million that was supposed to have been put
4 in by Prospect CharterCare. That was part of the
5 original consideration. It was flaunted. It was
6 publicized. We had every reason to believe, because we
7 have been so frustrated about getting information about
8 what they put in, that we actually are going to file
9 another motion to adjudge Prospect CharterCare in
10 contempt because they have not responded to the subpoenas
11 which you had authorized us to settle in giving this
12 information. They have actually affirmatively said they
13 would not give the information to Mr. Fine because they
14 were afraid he was going to share it with us. That was
15 the information we were entitled to.
16 So all I ask is this, your Honor: There is nothing
17 final about any of this. This whole issue of can they
18 transfer this to us, can they not, if your Honor wants to
19 sit down and read through the papers and make an
20 adjudication of whether or not it's legal, then I would
21 suggest that that probably should be res judicata when we
22 get to the Federal Court on that issue.
23 So I still suggest probably the simplest
24 straightforward thing is -- this is for the benefit of
25 the estate. You know, my brother says and I really thank

1 him for his consideration that he wants to save the state
2 money. I'm sure that is one of his principle concerns.
3 First of all, there are no legal fees that we're
4 charging. We're on a straight contingency. So far it's
5 starting to look like I'm getting something like the
6 federal minimal wage for the number of hours we're
7 putting in to this thing. Yes, there will be some
8 expenses but those will be minimum. There are no
9 significant attorney fees. Mr. Halperin need not lose
10 sleep over the loss of money to the estate.
11 THE COURT: Counsel, what about the issue of by
12 filing the UCC and taking the assignment that now
13 Prospect entities can say there has been an injury?
14 MR. WISTOW: My answer to that is very simple. That
15 is a prohibition on hypothecate. Absolutely. We
16 acknowledge that. Our justification is two fold.
17 THE COURT: I'm asking a different question. With
18 respect to the standing, the position was that the
19 objecting parties, especially CharterCare Foundation and
20 Prospect, don't have standing. By now the security
21 interest being filed, do you agree or not with counsel?
22 MR. WISTOW: I guess what we're talking about is --
23 I don't know the answer. I'm not the legal scholar Mr.
24 Sheehan is. But I will say this: I don't see how
25 Prospect CharterCare is injured in any way, shape or form

1 by CCB transferring the 15 percent unless it's a breach
2 of contract, and I say it's not a breach of contract and
3 we specifically say -- we laid it out for your Honor why
4 we're entitled as an affiliate to do what we did in spite
5 of what my brother says. It's easy enough for your
6 Honor. Just take a look at paragraphs 13.1 and 13.2 and
7 you decide whether or not we needed anybody's permission
8 to make this transfer. I submit we do not. If your
9 Honor thinks as a matter of law we breached the
10 contracts, I would be utterly surprised.
11 In any event, whether or not we have standing, still
12 they have no injury of any sort. So I would ask your
13 Honor to please allow this thing to go forward. It's
14 going to be many months until Judge Smith dismisses all
15 of our claims. The motion to dismiss pending would be
16 many months before we have anything really to say about
17 the merits of this thing. And even then, your Honor, it
18 may follow that our attempts to force the $50 million to
19 be paid, which is one of the things we want to do.
20 THE COURT: Thank you very much.
21 MR. WISTOW: Thank you, your honor.
22 THE COURT: There are a few other parties that
23 filed memorandum in support of the Receiver. Attorney
24 Violet.
25 MS. VIOLET: Your Honor, Mr. Callaci asked me to

1 read his statement briefly.
2 THE COURT: Go right ahead.
3 MS. VIOLET: And if I could take 60 seconds to
4 reiterate our adoption of the argument made by the
5 Receiver's counsel, and while there is somewhat of a mini
6 trial that has occurred here, we still think that this
7 Court should not be adjudicating all the possible
8 objections to the proposed settlement. The issue really
9 should be limited to whether it's in the best interest of
10 the Receivership estate for him to proceed with the
11 proposed settlement and leave all the other possible
12 objections to be dealt with in the first instance by the
13 Federal Court.
14 Your Honor, on behalf of my clients, I think that is
15 the most expeditious way to handle it. Their ages are 75
16 to 99. This helps really alleviate the $12 million, the
17 deep concern they have every single month. I also want
18 to say that also by having this proposed settlement it
19 really mitigates the winners versus the losers and we
20 never then have to reach any of subsidiary arguments as
21 to who is more entitled or not at this point.
22 Now, on behalf of Chris Callaci, UNAP, and the 400
23 plan participants, and I quote: "I want to speak to the
24 objection that the Prospect entities have filed with
25 respect to the proposed settlement agreement and the

1 reasons they give as to why the Court should refuse to
2 approve. On page six of their memo they argue, "The
3 Receiver has acted in a manner inconsistent with his role
4 as a fiduciary of the court." We don't think so, and,
5 your Honor, he then cited to the very same paragraph five
6 that Max Wistow alluded to where you gave him full power
7 to adjust and compromise all claims and suits against the
8 respondent, including paragraph A where they could engage
9 Wistow Sheehan & Lovely to serve and confirms and
10 ratifies his authority to do so." Mr. Callaci continues
11 on page 15 of the memo, "The Prospect entities argue that
12 the proposed settlement agreement is not in the best
13 interest of the Receivership estate." According to Mr.
14 Del Sesto just the opposite is true.
15 On page eight, paragraph 17, of this petition the
16 settlement instruction he writes, "It is absolutely
17 certain that if the proposed settlement is not approved,
18 the settling defendants' assets will be further
19 dissipated by litigation, expense, and claims of other
20 creditors such that it is indisputable that the sum that
21 the plaintiffs may collect from the settling Defendants,
22 if they prevail, will be substantially less than what is
23 being offered in the settlement." The Receiver goes on
24 to say on page 13, paragraph 35, "He believes that the
25 proposed settlement advances the interest of the

1 receivership estate for the plan and the plan
2 participants." When it comes to what is in the best
3 interest of the estate, the plan, and plan participants,
4 the people I represent find the words of Mr. Del Sesto
5 far more reliable than the words of the Prospect
6 entities, who are defendants and who are alleged to have
7 played a central role in the very collapse of the pension
8 fund.
9 The proposed settlement agreement before you is the
10 product of good faith negotiations engaged in by a number
11 of very capable and well-respected attorneys. The
12 argument that this is evidence of collusion is certainly
13 a stretch. But their next argument is particular
14 troubling to us at UNAP. The Prospect entities argue
15 that the settling parties violated the HCA by,
16 "Disregarding the prior administrative and regulatory
17 positions of Rhode Island Attorney General and the Rhode
18 Island Department of Health."
19 How dare the Prospect entities complain about
20 someone disregarding the regulators and the decision of
21 the Attorney General and the Department of Health? One
22 regulator asked Prospect and CharterCare the following
23 question point blank: "What is the plan going forward to
24 fund liability?" Answer: "Future contributions to the
25 plan will be made on recommended annual contribution

1 amounts as provided by the plan actuary advisors." You
2 will find that exchange on page 60, paragraph 222 to 223
3 of the complaint that is pending here in Providence
4 Superior Court as well as the complaint in Federal Court.
5 When our Attorney General approved that conversion
6 he issued a decision with conditions. On page 52 of his
7 decision he wrote, "Upon any change in what was
8 represented by the transacting parties in connection with
9 the approval of this transaction reasonable prior notice
10 shall be provided to the Attorney General." And on page
11 54 he required them to, "Notify the Attorney General of
12 any actions out of the ordinary course taken in
13 connection with the St. Joseph's pension or any material
14 changes in its operation and/or structure."
15 Neither Prospect or CC ever notified the Attorney
16 General that no contributions were going to be made to
17 the pension plan post conversion. There was absolute
18 silence in that regard, but the Attorney General and the
19 Department of Health required as a condition of approval
20 the proposed conversion. And I quote, "The transaction
21 be implemented as outlined in the application." See also
22 the Department of Health quote, "The transacting party
23 shall implement the conversion as detailed in the
24 application." Neither Prospect or CharterCare
25 implemented the conversion as detailed in the

1 application. No contributions have been made to the
2 pension since the conversion in 2014. Therefore,
3 Prospect entities' new found respect for our Attorney
4 General and Department of Health cannot be more than
5 self-serving.
6 Your Honor, the 400 or so folks that I represent
7 have expressed their full support in the proposed
8 settlement agreement. They see it as a ray of hope that
9 perhaps they will be able to retire with some dignity and
10 respect coming out of this proceeding. This proposed
11 settlement, if approved, will also move along what would
12 otherwise be a very painful and difficult process for all
13 involved in determining what reductions in benefits will
14 need to be made and the extent to which planned
15 participants will suffer in that regard. As such, we
16 respectfully request that the Court approve the proposed
17 settlement agreement."
18 THE COURT: Attorney Fine.
19 MR. FINE: Thank you, your Honor. I represent the
20 settling Defendants. We have not filed anything but
21 fully support the Receiver's request and join in the
22 legal argument. We believe it's the most appropriate
23 action for these three defendants to take. The relief is
24 we will obtain half value. We believe it's in the best
25 interest of the pension holders as well as the settling

1 defendants.
2 I am happy to try and answer any questions the Court
3 may have to the settling defendants.
4 THE COURT: Not at this time. Thank you very much.
5 MR. FINE: Thank you, your Honor.
6 THE COURT: Very good. That brings this three and a
7 half hour hearing to a close. Yes. I'm sorry.
8 MR. BREQUET: Your Honor with the Court's
9 permission, I would like to speak on behalf of Mr. Kasle
10 that the 247 persons that he represents are in full
11 support of this particular settlement.
12 THE COURT: Thank you very much. The Court
13 understands the timeliness of the disagree's decision in
14 this case so the Court is going to reserve. The Court
15 will be issuing a written decision. In order to move
16 that along, the Court is going to direct the Receiver to
17 order a copy of the transcript of the proceeding today so
18 we can move along the Court's consideration.
19 I want to thank all of the parties for their
20 arguments, and, most importantly, their briefing in this
21 case. I think it really brought out some of the issues
22 that this Court needs to wrestle with in coming to a
23 decision. With that, this Court will be in recess and I
24 believe the next thing on the calendar is a motion we
25 have on this case next week with Attorney Russo. Thank

1 you all very much. The Court is in recess.
2 (A D J O U R N E D.)
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