

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

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

VS.)

CASE NO: PC/2017-3856)

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

HEARD BEFORE ASSOCIATE JUSTICE BRIAN P. STERN ON:

THURSDAY, OCTOBER 25, 2018

APPEARANCES:

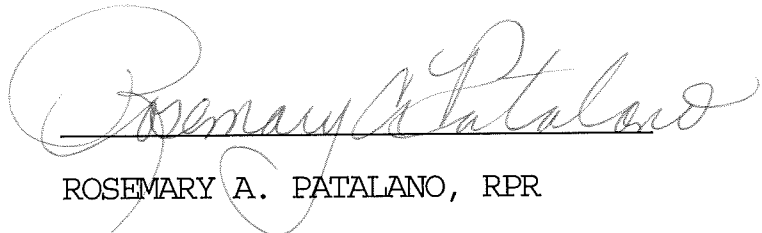
STEPHEN F. DEL SESTO, RECEIVER

MAX H. WISTOW, ESQUIRE
STEPHEN P. SHEEHAN, ESQUIRE
BENJAMIN G. LEDSHAM, ESQUIRE
FOR THE RECEIVER

W. MARK RUSSO, ESQUIRE
JOSEPH V. CAVANAGH, III, ESQUIRE
FOR PROSPECT CHARTERCARE, LLC

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

I, Rosemary A. Patalano, hereby certify that the succeeding pages, 1 through 56, inclusive, are a true and accurate transcript of my stenographic notes.

A handwritten signature in cursive script, reading "Rosemary A. Patalano", written over a horizontal line.

ROSEMARY A. PATALANO, RPR

Certified Official Court Reporter

1 Court please do so at the lectern so the court reporter
2 can get a clear record.

3 Second before the Court, and we're going to hear
4 arguments in a couple of -- in a couple of moments, is
5 the receiver's motion to hold Prospect Chartercare, LLC
6 in contempt.

7 The Court has received the motion with memo. The
8 Court has received the objection in the memo. And the
9 Court has also received the reply. So I have all of
10 those before me. I have read them at this point.

11 And I just want to say -- because this, of course, is
12 to help the Court to process through the motions and the
13 objections -- that there's certainly issues, in addition
14 to others you may want to raise, that the Court would ask
15 the parties to certainly touch on during the oral
16 argument.

17 First, whether or not the settlement agreement is an
18 asset or property of the receivership estate; whether the
19 request for declaratory order filed with the Rhode Island
20 Attorney General and it appears the Rhode Island
21 Department of Health is a proceeding in law or equity or
22 any statute or otherwise against the receiver or its
23 assets. And that's not meant to limit the Court's order.
24 That's generally what I am talking about.

25 Do the parties agree that if the answer is no to

1 either of those questions, then Prospect was not required
2 to seek this Court's approval before these regulatory
3 agencies. And if the answer is yes to both of these,
4 that this Court should consider whether or not the
5 elements of civil contempt are met, as well as
6 considering any equitable defenses that Prospect
7 Chartercare may have.

8 I also want to say, because I've read in the papers
9 and I just want to be clear, the motion before the Court
10 today is not to determine whether or not Prospect
11 Chartercare can seek a declaration from the attorney
12 general or the Rhode Island Department of Health. The
13 issue is very narrow. The issue is whether or not
14 Prospect Chartercare was required to obtain approval of
15 this Court before filing these requests.

16 After reading the papers, there is some discussion
17 about that the attorney general and the department of
18 health should be able to weigh in on some of these, these
19 issues. This Court has been extremely clear in other
20 hospital cases, including the Westerly Hospital
21 receivership, what a critical statutory role the attorney
22 general and the department of health play in hospital
23 conversion act proceedings and that's, in fact,
24 applicable.

25 So with the Court framing it that way – and please,

1 that does not limit whatever arguments counsel wants to
2 make -- I would ask to move and to please proceed.

3 MR. WISTOW: Thank you, Your Honor.

4 As Your Honor indicated, this is a motion to adjudge
5 in contempt. And the basic premise of it is looking --
6 can be found in the First Circuit case in the matter of
7 *Providence Journal Company* which basically says:

8 "Equally well-established is the requirement of any
9 civilized government that a party subject to a court
10 order must abide by its terms or face criminal contempt.
11 Even if the order is later declared improper or
12 unconstitutional, it must be followed until vacated or
13 modified."

14 Now, Your Honor asked us to focus on two issues:
15 Whether or not the settlement agreement is an asset of
16 the receiver, and I am going to address that; and what
17 exactly was this declaratory judgment? How does it
18 affect the receiver or does it -- is it an action, in
19 effect, against the receiver or, more properly, an action
20 against the receiver's asset? That's what I would like
21 to address.

22 THE COURT: Please.

23 MR. WISTOW: And I just -- I should've learned my
24 lesson by now. I know that Your Honor reads these papers
25 meticulously. But I just for the -- for the record --

1 THE COURT: Please.

2 MR. WISTOW: -- and the people here who are
3 interested generally in what this is about.

4 Your Honor will recall that there was an order
5 entered October 27, 2017, which made Mr. Del Sesto the
6 permanent receiver. He had previously been made
7 temporary receiver by Judge Silverstein on August 18. In
8 applicable provisions, both of the orders are the same.
9 And they basically -- not basically, I will quote from
10 them.

11 "That the commencement, prosecution, or continuance
12 of the prosecution, of any action, suit, arbitration
13 proceeding, hearing, or any foreclosure, reclamation or
14 repossession proceeding, both judicial and non-judicial,
15 or any other proceeding, in law, or in equity or under
16 any statute, or otherwise, against the Respondent or any
17 of its assets or property, in any Court, agency --"

18 Specifically, agency. And then I am going to skip
19 over, he's got a lot of technical language.

20 "...without obtaining prior approval thereof from
21 this Honorable Court, in which connection said Receiver
22 shall be entitled to prior notice and an opportunity to
23 be heard, are hereby restrained and enjoined until
24 further Order of this Court."

25 Now the same order, Your Honor, Paragraph 5, said:

1 "That said Receiver be and hereby is authorized,
2 empowered and directed to take control, possession and
3 charge of said Respondent --"

4 That's the Plan.

5 "-- and its assets --"

6 And that's very important.

7 "-- and its assets, wherever located, and manage and
8 continue the administration and oversee the Respondent
9 and to reasonably preserve the same, and is hereby vested
10 with title to the same; to collect and receive the debts,
11 property and other assets and effects of said
12 Respondent --"

13 And I throw this in, Your Honor, because of the
14 criticism we have been subjected to that we brought suit
15 without permission or entered into a settlement agreement
16 without final permission. It goes on to say:

17 "-- with full power to prosecute, defend, adjust and
18 compromise all claims and suits of, by, and against or on
19 behalf of said Respondent..."

20 Now, we had claims. Witness the various lawsuits we
21 brought both in federal court, state court. Those were
22 claims. We moved to intervene in the *cy pres* proceeding.
23 As to some of those claims, which were assets, we
24 perfected them, made them a little bit more tangible,
25 with CCCB, Chartercare Community Board; the old Roger

1 Williams Hospital, and the old Fatima Hospital by
2 entering into a settlement agreement.

3 Now, the first point is, what is that settlement
4 agreement? Is it an asset now? And the most eloquent
5 expression of whether or not it's an asset, I believe, is
6 a letter from Mr. Halperin, which appears as Item No. 7
7 in the next motion for contempt. It's not before this
8 Court at this point, but I'd like to hand it up.

9 (Court and counsel in receipt of document)

10 THE COURT: Thank you.

11 MR. WISTOW: And I want to compliment Mr. Halperin
12 in his concise summary of what the settlement agreement
13 gave us. And I don't happen to agree with his versed
14 conclusions, but I do agree with his categorization of
15 what was the effect of the settlement agreement.

16 "1. That CCCB will hold its 15 percent membership
17 interest in Prospect Chartercare, LLC in trust for the
18 Receiver and that the Receiver will have the full
19 beneficial interests therein. Settlement Agreement,
20 paragraph 17;

21 2. That the Receiver will have the power to direct
22 and control CCCB's future exercise of the put option set
23 forth in the LLC Agreement. Settlement Agreement,
24 paragraph 18;

25 That the Receiver shall have the right to sue in the

1 name of CCCB to collect or otherwise obtain the value of
2 the beneficial interest in Prospect Chartercare LLC.
3 Settlement Agreement, Paragraph 19;

4 That upon the Receiver's written demand, CCCB file a
5 petition for its Judicial Liquidation and follow the
6 requests of the Receiver to marshal its assets and oppose
7 the claims of other creditors..."

8 Finally, "That CCCB grant the Receiver a security
9 interest in its assets, investment property and general
10 intangibles, which would include its membership interest
11 in Prospect Chartercare LLC."

12 And indeed, such a security interest was granted and
13 UCC filings were made.

14 So there was a present existing contract. True,
15 that contract had to be submitted to the Court for final
16 approval. And it will be submitted yet again to the
17 federal court, if this Court approves it. But the
18 contract is subject to a condition subsequent. It is a
19 binding contract. No different than a purchase and sale
20 between a buyer and seller of real estate that's subject
21 to zoning, the zoning board approval; and if there's no
22 zoning board approval, the contract is off.

23 My brother, Mr. Russo, really confuses conditions
24 precedent, conditions subsequent, in his memorandum.
25 Sometimes he calls this contract subject to a condition

1 precedent. Sometimes he calls it subject to a condition
2 subsequent. It clearly is a contract that is presently
3 binding. Right now. The CCB is holding the assets in
4 trust.

5 "Additionally, the Receiver asserts --" and I am
6 going to read to you from a portion of Prospect's
7 memorandum on this issue. "Additionally --" and this is
8 on Page 14 of Prospect's reply.

9 "Additionally, the Receiver asserts that the
10 Settlement Agreement itself constitutes an 'asset' as it
11 is a 'presently binding contract that presently provides
12 rights and interests...to the Receiver.' However, such
13 contention does not comport with the law, as a
14 conditional contract--such as the Settlement
15 Agreement--does not become binding until the condition
16 precedent contemplated therein occurs."

17 I rarely have the temerity to get up and just say
18 he's just plain, ordinary wrong. But in this instance, I
19 do feel I have to say that.

20 By the way, there's case law in bankruptcy, at any
21 rate, that even if the receiver's contract rights are
22 contingent, they're still assets and property of the
23 receivership estate.

24 THE COURT: I am well aware of that case law.

25 MR. WISTOW: Beg your pardon?

1 THE COURT: I am well aware of that case law.

2 MR. WISTOW: Right. So I don't consider this to be
3 contingent. I consider we presently have rights that we
4 subsequently can lose if Your Honor says no. Now, what
5 are --

6 What I wanted to point out and what's especially
7 troublesome about all of this is Mr. Halperin in the
8 letter I handed up alleges expressly that --

9 THE COURT: Just so I am clear. Attorney Halperin
10 was sending this letter on behalf of Prospect Holdings,
11 Inc., which is not the entity at least which this
12 contempt motion is against?

13 MR. WISTOW: That's true.

14 THE COURT: No, I just --

15 MR. WISTOW: That's true.

16 It's hard to tell the parties. He's writing on
17 behalf of the other member of Prospect Chartercare.
18 There are two members: Prospect East, Mr. Halperin's
19 client, who owns 85 percent; and Mr. Land's client, CCB,
20 which owns 15 percent.

21 So yes, it's true. But he is alleging, he is
22 alleging that there is a violation of the LLC agreement
23 because he quotes:

24 "...member may not sell, assign (by operation of Law
25 or otherwise), transfer, pledge or hypothecate

1 ('Transfer') all or any part of its interest in the
2 Company (either directly or indirectly through the
3 transfer of the power to control, or direct or cause the
4 direction of management and policies, of, such Member."

5 Now we had a meeting, Your Honor, on September 24
6 following this letter. And I'd like to hand up -- this
7 is also in the record, but for ease, an affidavit that I
8 submitted with regard to that meeting.

9 (Court and counsel in receipt of document)

10 MR. WISTOW: And after identifying myself and after
11 being sworn, I said that "On September 24 --"

12 This follows the letter from Mr. Halperin.

13 -- Stephen Sheehan, Benjamin Ledsham, and I "met at
14 our office together with attorneys Preston Halperin,
15 Richard Land, Robert Fine."

16 Fine is, of course, Mr. Land's partner.

17 "During that meeting, I informed Mr. Halperin that
18 the Settlement Agreement (among, *inter alia*, the Receiver
19 and CharterCARE Community Board) was property of the
20 Receivership Estate, and urged him to seek permission
21 from this Court before 'taking any action which will in
22 any way seek to impair the Receiver's right to the assets
23 and property of the Receivership Estate.' I also
24 informed him that any attempt to interfere with the
25 settlement outside of the Receivership Proceeding would

1 violate the Court's Orders and subject his clients to
2 contempt proceedings.

3 On September 27, 2018, I followed up with the letter
4 to Mr. Halperin attached to the Receiver's Memorandum of
5 Law in Support of His Motion to Adjudge..."

6 And I would just like to hand up that letter, Your
7 Honor, that followed from the meeting.

8 (Court and counsel in receipt of document)

9 MR. WISTOW: So, I am not going to read it. It just
10 memorializes that I said to him, "If you're going to do
11 anything, first go to Judge Stern and let's fight it out
12 as to whether you are going to do anything, okay?"

13 Now, Your Honor is aware of the fact that the
14 Prospect entities have objected to the settlement
15 agreement before you, have argued essentially all of the
16 things that they're arguing in front of the department of
17 health and the attorney general. And we are awaiting the
18 decision from Your Honor --

19 THE COURT: Actually, I don't know what their
20 argument is before the department of health.

21 MR. WISTOW: I am going to show you that.

22 THE COURT: Oh, okay. I hope.

23 MR. WISTOW: I only got it last night.

24 So, what it really comes down to is -- I don't know
25 if I should use the vocal expression "end run around Your

1 Honor" or "having your cake and eat it." But they argue
2 in front of Your Honor the very same things to oppose the
3 settlement and then run to these agencies to invalidate
4 the settlement. And I'm going to get into what is it
5 they're doing with these --

6 THE COURT: Before we get into the -- because there
7 seems to be some discussion, not in the receivership
8 context but under the bankruptcy code and the automatic
9 stay. Is this -- does the order in this case apply to
10 subsequently collected assets after the stay order is in
11 place?

12 MR. WISTOW: I believe it does.

13 THE COURT: Because --

14 MR. WISTOW: I believe it absolutely does. And by
15 the way, these were not subsequently collected assets.

16 THE COURT: Okay. And that's what I want to ask you
17 about.

18 MR. WISTOW: Because what these were were a
19 formulation, a settlement of a claim. We have the claim.

20 And by the way, in spite of the comments about how
21 my office and Mr. Land colluded together, I would've
22 welcomed people watching how we fought each other banging
23 out this settlement agreement.

24 THE COURT: Let's continue on that line in terms of
25 settlement. Because again, I just want to understand --

1 understand the issue.

2 I understand that this Court's order is very
3 different than a § 362 automatic stay order under the
4 code. But so why should this order apply to -- and what
5 you're saying is that it's a -- it's not a subsequently,
6 you started talking about a claim.

7 MR. WISTOW: Right. What I am saying is when
8 Mr. Del Sesto walked in and took over as receiver, he had
9 a claim against CCB, old Roger Williams Hospital, and old
10 Fatima Hospital. There is no doubt about it. We brought
11 suit. And we settled that claim.

12 So what we did was we took -- I don't know if you
13 want to call it an inchoate claim and made it choate. We
14 took a disputed claim, which was an asset -- whatever you
15 want to call it, it was an asset -- and we solidified that
16 asset and made it clear what it was.

17 Now what exactly, why are we upset and asking for
18 contempt with -- based on the fact that Prospect
19 Chartercare went to the department of health and to the
20 AG? What exactly did they do or attempt to do to our
21 property? And I really don't see any question but that
22 this was our property. I appreciate Your Honor's inquiry
23 as to, you know, what were they doing to our property, if
24 anything. And I'd like to address that.

25 In the petition for declaratory order in front of

1 the AG, which is an exhibit before the Court, it was
2 submitted along with the objection to the settlement, if
3 I recall. And I'd like to just read to Your Honor
4 Paragraph 48.

5 "Acquiror --"

6 That's Prospect Chartercare.

7 "-- submits that a proper interpretation and
8 application of the HCA --"

9 Hospital Conversion Act.

10 "-- and the HLA --"

11 Frankly, I am not even sure what that is.

12 "-- and a proper application of the Final Conversion
13 and CEC Decisions issued by the respective administrative
14 agencies in May of 2014 --"

15 The attorney general's department.

16 "-- must result in a determination that the transfer
17 proposed by the Receiver to advance the Settlement
18 violates the HCA and HLA and is at variance with the
19 Final Conversion and CEC Decision."

20 That's the first request for declaratory order. So
21 he wants the agencies to say that what we're trying to do
22 here is a violation of the law. The second --

23 Then he goes on to say, Paragraph 53, when I say
24 "he" goes on to say, Prospect Chartercare:

25 "The transfer proposed by the Receiver to advance

1 the Settlement -- "

2 That's the transfer of the interest of the
3 15 percent.

4 "-- is at absolute variance with those concepts and
5 policy adopted by the Final Conversion and CEC Decisions
6 and cannot be allowed absent regulatory relief."

7 He is asking the agency to say you cannot do this.

8 Then another request for declaratory relief:

9 "Moreover, in order to approve a Conversion of this
10 nature, § 8 of the HCA and § 4.2(h) of the HCA
11 Regulations would require the Receiver to demonstrate
12 compliance with the Final Conversion and CEC Decisions.
13 In this instance, for the reasons set forth herein, the
14 Receiver would not be able to demonstrate compliance with
15 those Decisions and thus, the proposed Conversion could
16 not be approved."

17 This isn't an allegation. This is a request for an
18 order. This is what they -- what Chartercare is asking
19 for a determination on.

20 Finally on that point he said -- it goes on for the
21 Third Request for Declaratory Order:

22 "Acquiror seeks a declaratory order and submits that
23 a proper application of the Final Conversion and CEC
24 Decisions to the Acquiror would render any application by
25 the Receiver for the review and approval of the proposed

1 transfer to advance the Settlement as barred by the
2 doctrine of administrative finality."

3 In other words, our settlement can't work. That's
4 what he wants them to declare.

5 Now, in the department of health submission, which
6 apparently Your Honor doesn't have?

7 THE COURT: No, I do not. It was referenced in the
8 objection but nothing. There was no exhibit.

9 MR. WISTOW: I got it last night myself.

10 I am wondering if one of you gentlemen, well --

11 THE COURT: Well, if you want, if there are certain
12 portions that you want to read into the record, we can
13 make some copies.

14 MR. WISTOW: Yeah. I will, Your Honor.

15 (Mister Ledsham provides document)

16 MR. WISTOW: Thank you.

17 I will hand it up.

18 THE COURT: Thank you.

19 (Court in receipt of document)

20 MR. WISTOW: Your Honor, I direct your attention to
21 Paragraph 47.

22 "Accordingly, the Petitioner --"

23 Prospect Chartercare.

24 "-- seeks a declaratory order as follows:

25 If the HCA and HLA are properly interpreted and

1 applied and/or the Final Conversion and CEC Decisions are
2 properly applied to the Petitioner, the transfer proposed
3 by the Receiver to advance the Settlement violates the
4 HCA and HLA, as it is at variance with the Final
5 Conversion and CEC Decisions. Thus, the Receiver would
6 have to apply to the administrative agencies with
7 jurisdiction for relief;"

8 And then he goes on to say:

9 "If the HCA and HLA are properly interpreted and
10 applied, the transfer proposed by the Receiver to advance
11 the Settlement is a 'conversion' as defined by § 4(6) of
12 the HCA, as it would result in the transfer of more than
13 20 percent of the voting control of the Acquiror."

14 And he goes on to say that can't be done.

15 Now, I don't want to get into why I think he's
16 completely wrong.

17 THE COURT: Well, that's not the issue.

18 MR. WISTOW: That is not the issue.

19 But if we thought, Your Honor, that this violated
20 the law, this transfer -- and by the way, we could be
21 mistaken; but if we thought it violated the law, we've
22 gone through a devil of a lot of work to get a settlement
23 agreement that's not going to work. We think that there
24 are multiple reasons why this is proper. In any event,
25 we have the very bizarre -- before --

1 Before I get into that, Your Honor, I want to read
2 you something from the reply memo put in by Prospect
3 Chartercare as to what how innocent their activities
4 were. And what they say, and I quote:

5 "It is extraordinary that the Receiver would take
6 the position that Prospect is precluded from seeking, and
7 indeed is in contempt, merely for having sought the input
8 of the Rhode Island Department of Attorney General and
9 the Rhode Island Department of Health on the legality..."

10 He was not looking for the, quote, input. He wasn't
11 writing for opinion. He was asking for judgments,
12 orders, saying this thing is completely invalid. And I
13 suggest that the comment made to Your Honor that all he
14 did was sought the input is somewhat disingenuous.

15 What's also bizarre, I don't know even know how to
16 address this. There's all of these references to if this
17 goes through, somehow there's going to be a shift of the
18 obligation to make the pension payments to the acquiror.

19 THE COURT: Well, and that's the question I have for
20 counsel, if you want to address it. I did see that in
21 these papers.

22 MR. WISTOW: It's just not so. So, we -- all of
23 these points regarding this --

24 We argued before Your Honor that there was no change
25 in control with Roger Williams or Fatima, which are the

1 only licensed hospitals. They still remain in the same
2 exact control. They're 100 percent owned by Prospect
3 Chartercare. What's going to change is the ownership of
4 the member and the parent. And that, we contend, is not
5 covered by the hospital conversion. I'm sure they
6 contend the opposite. And -- but that's ultimately a
7 legal question that we are prepared to fight out in the
8 courts.

9 By the same token --

10 THE COURT: And I guess we are not there either.

11 The question --

12 MR. WISTOW: Exactly.

13 THE COURT: -- is not where it gets fought out,
14 because I don't know, it may be perfectly appropriate
15 that it gets fought out at a regulatory level. I don't
16 know at this point.

17 MR. WISTOW: Fair enough.

18 So to continue on with what they're asking, and this
19 is startling. They're asking the department of health,
20 Paragraph 66:

21 "Acquiror requests a declaratory order and submits a
22 proper application of the Final Conversion and CEC
23 Decisions bar any claim that the Acquiror is liable for
24 the Plan, including such claims in the Federal Court
25 Litigation based upon the doctrine of *res judicata*.

1 67. Under Rhode Island law, the doctrine of *res*
2 *judicata* makes a prior decision in a quasi-judicial
3 action between the same parties conclusive regarding the
4 issues that were litigated in the prior action or, that
5 could've been presented and litigated therein."

6 First of all, our claim was not litigated in the
7 prior action, it was a different action. We're the plan,
8 not arguably the people we were suing. And this shows
9 you just how far they're going. They're not trying to
10 just upset the settlement agreement, they're trying to
11 upset the entire lawsuit. They're asking for
12 adjudication.

13 Now happily, the attorney general came back with a
14 response which I'd feel better if I thought I could
15 explain to Your Honor what the attorney general was
16 saying. But it looked like he was saying, "I am not
17 getting involved, gentlemen."

18 THE COURT: And that's my question, because I didn't
19 see it either. Is the issue with respect to the attorney
20 general moot at this point other than the Court deciding
21 if there was a violation of the order?

22 MR. WISTOW: I -- I can give Your Honor what the
23 attorney --

24 THE COURT: But it sounds like even if it was, we
25 still have an issue with the department of health. So,

1 we still need to address the underlying issue.

2 MR. WISTOW: Yes. And what --

3 I believe that the attorney general flat out says
4 that he disagrees with Prospect Chartercare. That was
5 filed with this court. I have another copy I can give
6 you, it's very short. But he says:

7 "Despite the Prospect Entities' argument otherwise,
8 the doctrine of administrative finality --"

9 THE COURT: Oh, no. I read that. That was in the
10 last motion. I am saying that has the -- has the
11 attorney general declined to proceed on this? Okay.

12 MR. WISTOW: All I know is --

13 That's all I know. We've heard nothing from the
14 department of health. My brother has indicated that he
15 seems to think they're going to rule. And they've
16 indicated in their reply that they're going to take an
17 appeal from. So it's a very strange situation, to say
18 the least.

19 So the bottom line, Your Honor, the assets in the
20 hands of the receiver, there's no dispute, this contract
21 is an asset. Nobody can argue against that. And those
22 assets are *in custodia legis*. Your Honor is holding
23 them, in effect, through your receiver. And the law is
24 absolutely clear that:

25 "No one may enforce a right to specific property in

1 the possession of the receiver except on application to
2 the court which appointed him, the property being in the
3 custody of the court and immune --"

4 Immune.

5 "-- from interference without permission of the
6 court."

7 That's a -- the cites are in my brief.

8 "The general doctrine that property in the
9 possession of a receiver appointed by a court is *in*
10 *custodia legis*, and that unauthorized interference with
11 such possession" is a contempt.

12 So, all we're saying, Judge, is we gave them express
13 warning. We said, "Don't do this. Go to the Court."
14 They argued to the Court all the same things they're
15 arguing. They just did an end run around you.

16 So, here's what we would like for a remedy. We
17 would like you to order them to withdraw this, you know,
18 without prejudice to coming back to the Court and asking
19 for permission, if they wanted to re-do it, but to order
20 them to withdraw it now; and to order and as a sanction
21 of \$50,000 to be paid into the plan, not as attorneys'
22 fees, but directly into the plan.

23 Thank you, Your Honor.

24 THE COURT: Thank you very much.

25 Counsel.

1 MR. RUSSO: Thank you, Your Honor.

2 Your Honor, the current ownership operation and
3 voting control structure relative to Roger Williams and
4 Our Lady of Fatima was subject to and secured regulatory
5 approval. I don't think anybody debates that. And that
6 structure revolves around my client, Prospect
7 Chartercare, LLC.

8 And although I think Attorney Wistow has attempted
9 to debate that in his argument and the argument before
10 the Court on the settlement or the petition for
11 instructions for settlement, at Paragraph 11 of the first
12 amended complaint in the federal court, what he alleges
13 on behalf of his client is:

14 "Prospect Chartercare owns and operates health care
15 facilities in Rhode Island, including not limited to two
16 hospitals, Roger Williams Hospital and Our Lady of Fatima
17 Hospital, having acquired them in connection with an
18 asset sale that closed on June 20, 2014."

19 And we agree with that. And that asset sale came as
20 a result, as Your Honor is familiar in his opening
21 remarks, of the HCA, and HLA is hospital licensing act;
22 and that's the CEC change in effective control approvals
23 that Your Honor is aware of, from previous in this
24 superior court through receivership proceedings, is very
25 well aware of.

1 Hospital ownership, its operation and voting control
2 structure in Rhode Island is highly regulated. I don't
3 think anyone can debate that.

4 And the one thing, my brothers cite the *Enron* case
5 which cites *Johns-Manville* and other cases. And as Your
6 Honor points out, the automatic stay provisions are
7 different than the receivership, but we look sometimes by
8 analogy, we often do here. But one thing all those cases
9 say is that it does not strip the regulatory community of
10 their police powers. So that --

11 THE COURT: But Counsel, you would agree that even
12 under, I think it's § 362(4), the regula -- the public
13 policy regulatory exception, that the regulatory agency
14 is taking the action, it's not a court.

15 MR. RUSSO: Understood.

16 THE COURT: Okay.

17 MR. RUSSO: And I --

18 THE COURT: I don't know -- I don't know if there
19 necessarily would be an issue if, you know, that would be
20 a whole different question if the attorney general or the
21 department of health affirmatively decided to open an
22 investigation or to look -- look at this. But it just
23 may be different.

24 MR. RUSSO: I agree. But I think it's ultimately to
25 get to the part one B of your series of questions, Your

1 Honor.

2 THE COURT: Yes.

3 MR. RUSSO: So, in this instance, what -- what the
4 receiver has proposed through the settlement and through
5 the law -- and keep in mind the settlement agreement is
6 to settle a lawsuit brought by the receiver pursuant to
7 his administrative powers under your order, which also is
8 critical to your series of questions.

9 But in any event, what he's proposing, we state,
10 runs contrary to that -- those regulatory approvals and
11 that regulatory structure. And under the structure
12 that's being proposed, there's a 15 percent membership
13 that has 50 percent voting control. And to change that
14 within the structure approved by the regulators, that's a
15 conversion.

16 And as you indicated, that may get fought out in
17 federal court. It may get fought out in the regulatory
18 arena. We don't know as of yet. But it is an issue.
19 And I think ultimately --

20 THE COURT: It may get fought out in Delaware.

21 MR. RUSSO: That's true. That's true. It probably
22 will get fought out in Delaware in part.

23 In any event, the regulatory community takes
24 conversions that are un-approved and un-reviewed very
25 seriously. The Landmark Hospital in October of 2017 was

1 fined a million dollars for doing that. Which would beg
2 the question as the receiver -- the receiver's counsel
3 stood before you and said, "If we thought we violated the
4 law, you know, we would not have set this up." Yet there
5 are no indications of any steps being taken to make
6 inquiry of the regulators as to whether or not this is an
7 appropriate structure. So, the receiver should've done
8 that.

9 And under *Greenwich Bay* that we cite in our superior
10 court, and this goes directly to your part B of your
11 first question; and that is, the utilization of Section 8
12 of the APA is an exhaustion of administrative remedies.
13 And in fact, in *Greenwich Bay* both parties were ordered
14 on remand to go to CRMC and ask for a Section 8
15 declaratory ruling.

16 THE COURT: But in this case -- and again, I said
17 it's a limited issue. The issue is, first of all,
18 Attorney Halperin, I don't believe, raised in the
19 objection -- well, he may have -- the fact that if the
20 Court grants the petition that the Court should condition
21 certain aspects, or even going forward with the proposed
22 settlement, if it's approved by the federal court, with
23 an application to the regulatory authorities to make
24 sure.

25 And certainly if it was a big issue, I'm just trying

1 to get my head around why. Because I don't know if you
2 were here, but Attorney Halperin argued before the Court
3 it's as clear as clear can be that this has nothing to do
4 with the Court's order. If it was such a big issue, why
5 wouldn't -- the Court may have said, "Sure, we're going
6 to do it this way."

7 MR. RUSSO: Your Honor, I believe the objection was
8 asking the Court to hold off until the regulators can
9 rule on that issue. That's why we attached the petition
10 for declaratory order as an exhibit.

11 But moving -- moving forward to your -- the
12 questions that you set up.

13 THE COURT: But the Court hasn't answered that
14 question.

15 MR. RUSSO: The Court hasn't answered that question?

16 THE COURT: No, I haven't ruled.

17 MR. RUSSO: Understood.

18 THE COURT: Okay.

19 MR. RUSSO: No, no. I agree with that. And I'm
20 assuming the Court had indicated sometime in the near
21 future there will be a ruling.

22 THE COURT: Tomorrow.

23 MR. RUSSO: A lot of these issues will be addressed.

24 THE COURT: Right.

25 MR. RUSSO: I didn't bring the motion to adjudge in

1 contempt. I really would rather not be here. I think
2 that a lot of these questions probably will be answered.

3 THE COURT: I guess my question is different. If it
4 was raised in the --

5 If it was raised in the objection, why didn't your
6 client come to the Court and either say "Look, we just
7 want to make sure there is not a violation; and if it
8 does fall under the order, we want -- we want relief
9 to -- well, relief from the injunction to go ahead and
10 file because it's that important that we need to do it."

11 MR. RUSSO: I --

12 THE COURT: As opposed to filing it without any
13 notice other than I got an Exhibit B of your objection,
14 and I read in your new papers you filed with the
15 department of health; and even after I've had a
16 conference call on this case with the parties, nobody
17 brought that to my attention, and I am forced with seeing
18 it this morning.

19 MR. RUSSO: Well, the department of health and the
20 department of attorney general filings were on the same
21 day, Your Honor, on the very same issues. And on the
22 cover letter, we asked to consolidate them. And I --

23 THE COURT: No, I understand that. But you didn't
24 ask -- you're talking about the proceeding was included
25 in the petition for instructions.

1 MR. RUSSO: Yes.

2 THE COURT: The department of health wasn't.

3 MR. RUSSO: No, the department of health was
4 apparently not attached, Your Honor.

5 THE COURT: Okay.

6 MR. RUSSO: But they were filed as companion
7 filings.

8 THE COURT: Right. And the first time the Court
9 knew about that was when I received your objection to the
10 motion in contempt.

11 MR. RUSSO: I understand, Your Honor. But the
12 objection to the petition for settlement instructions
13 included a request that the Court refrain approving that
14 until the regulators could voice their opinion to the
15 petition for declaratory order.

16 THE COURT: That's fine. So I guess it was just an
17 error that the department of health wasn't -- that wasn't
18 included as well.

19 Go ahead.

20 MR. RUSSO: It would've been the exact same
21 petition, Your Honor.

22 THE COURT: I don't know. I am just seeing it. I
23 have not read it.

24 MR. RUSSO: I'm representing to the Court that
25 they're exact.

1 So moving to your questions, Your Honor.

2 THE COURT: Yes.

3 MR. RUSSO: The petition for declaratory order is
4 not an action against the receivership or against any of
5 its assets or property. What Section 8 of the APA
6 states, and it's quoted in our papers, Your Honor:

7 "A person may petition an agency for a declaratory
8 order that interprets or applies a statute administered
9 by the agency --"

10 Which would be the conversion issue.

11 "-- or states whether, or in what manner, a rule,
12 guidance document, or order --"

13 And that's the finality of the HCA and CEC
14 Decisions.

15 "-- issued by the agency applies to the petitioner."

16 So, that that action is not an action against the
17 receivership or any of its assets or property.

18 The main difference between our uniform declaratory
19 judgments act and Section 8 of the APA is our uniform
20 declaratory judgments act actually requires the
21 petitioner to join all interested parties which would
22 require the joinder of the receivership estate.

23 Furthermore, Your Honor, in the cases that we cite
24 in our memorandum, particularly the *Liguori* case from our
25 supreme court, specifically states that that Section 8

1 APA petition cannot grant affirmative relief. What it
2 does is it -- it is a methodology, just like our uniform
3 declaratory judgment acts, to try to terminate
4 controversies by the administrative agency, giving some
5 guidance and some rulings as to the applicability of an
6 order or the applicability of a statute.

7 Your next question, Your Honor, was whether the
8 settlement agreement is an asset or property of the
9 receivership. And I think the Court needs to take one
10 step backward in doing that analysis. And it's what we
11 addressed in our papers. And that is, it is absolutely
12 clear that CCCB's 15 percent membership interest in
13 Prospect Chartercare is not an asset or property of a
14 receivership. And putting together a settlement
15 agreement, and I will get to the settlement agreement in
16 a moment, does not change that equation until it's
17 approved by the Court.

18 And in this instance, my brother argued to this
19 Court it's no different than if we had a purchase and
20 sale agreement. And that is a perfect analogy in a
21 receivership because many, many times we come before this
22 Court with a purchase and sale agreement to sell assets
23 or property of a receivership, the buyer signs that, the
24 buyer is bound by a deposit. However, that contract does
25 not become binding until this Court approves it because

1 this Court supervises and takes control of all the assets
2 and property of the receivership estate, wherever they
3 may be found.

4 So in this particular instance, to try and design a
5 settlement agreement that creates an argument that it's
6 binding, that stands this procedure on its head. I mean,
7 why did we have a federal court judge sitting in this
8 jury box taking notes and participating in that? Because
9 at some point that court will be asked to approve the
10 settlement agreement. So even if this Court approves it,
11 it can't be approved until it's approved by the federal
12 court.

13 So Your Honor asked a question about a contingent
14 right. And again, a contingent right -- that was the
15 *Enron* case that my brother cited, that contingent right
16 is contingent at the outset of the receivership estate.
17 It's not contingent, it doesn't become contingent during
18 the proceeding and then become without Your Honor's
19 approval, without the federal court's approval, an asset
20 or property of the estate.

21 And that -- that ties into another important
22 argument because --

23 THE COURT: But Counsel, let me just ask on this.
24 And I understand that you disagree with the breadth of
25 the Court's order. But the Court's order very

1 specifically gives the receiver the authority to
2 compromise and enter into agreements.

3 So if there was a question, and I understand your
4 argument at this point, again, why didn't your -- why
5 didn't you come to the Court as opposed to just filing?
6 Because it sounds like in reading your papers you believe
7 that it was too broad and, in fact, may be
8 unconstitutional. But I think you would agree that's not
9 a reason not to comply with the Court's order.

10 MR. RUSSO: Sure, no. It's a perfectly practical
11 question, Your Honor. And the practical answer would be
12 yes, I should have come here first.

13 But this -- this settlement agreement arose because
14 of litigation. The receiver, exercising his
15 administrative authorities, decided -- I haven't seen
16 court approval for it, but brought an action in the
17 federal court that's now pending. This settlement is in
18 the federal court. Their actions against my client is in
19 the federal court.

20 And based on the *Mid-City* case that -- well, not
21 based on, but by analogy to the *Mid City* case that we
22 cited, you can't have a situation where the receiver
23 decides, I am going to exercise my administrative powers,
24 institute litigation; and now my client's hamstrung on
25 how they might defend it.

1 And again, yes, it's a very practical answer to your
2 question. Yes, Judge, I could've very easily e-mailed
3 Carin, asked for a time to come over, filed something --

4 THE COURT: I think you just said on the record that
5 you should have.

6 MR. RUSSO: No, no. I said I could have.

7 THE COURT: I apologize.

8 MR. RUSSO: If I said I should have, no.

9 THE COURT: Then we can all go home.

10 MR. RUSSO: I want to correct that before my brother
11 jumps up out of his seat. No, I could have.

12 But in litigation, there are a number of different
13 reasons why you may not want to have a party who is now
14 not subject to a certain issue all of a sudden become
15 embroiled in a further proceeding as to whether or not
16 you can take that step as a way to defend against the
17 federal court case which was instituted by the receiver.
18 And that's *Mid City*. You can't institute the action and
19 then use the injunctive provision of the permanent
20 receivership order as a sword and say "Well, you can't
21 take that step to get an answer to protect yourself. You
22 can't do this, you can't do that."

23 THE COURT: But if that were the case, and I think
24 we are getting a little far afield, that would've come up
25 if a motion had been made and the receiver would've said

1 no. Because quite frankly, I don't know. And I don't
2 have the facts before me. I may have said to you "Great,
3 let's go get this issue, go get this issue resolved."
4 And would that have been the appropriate -- appropriate
5 time to bring up the -- to bring up the issue.

6 So I guess we're back to what you have kind of been
7 talking about which is, is that settlement agreement an
8 asset or not? And I hear what you're saying, is that
9 you're saying due to the fact that it was contingent on
10 this Court's approval and possibly the federal court's
11 approval, it did not constitute an asset. And if it
12 didn't constitute an asset in the property, the
13 injunctive order doesn't apply.

14 MR. RUSSO: Yes, Your Honor.

15 THE COURT: And then second of all, what you had was
16 in a statutory administrative, I forget the word you
17 used, appeal or whatever else and that you were -- you
18 were just asking for that and you didn't have the
19 obligation, similar to the uniform declaratory judgment
20 act, to join other parties. You had the authority to
21 just file it and I would say frame it how you decide it
22 should be before the agency.

23 MR. RUSSO: I'm sorry, Your Honor. I did not
24 understand your question.

25 THE COURT: That you have the -- you had -- it was

1 the injunction, even if it was a settlement, was not
2 applicable because the procedure that you went through
3 under the administrative agency, statute, or rules was
4 appropriate to get a determination; and you weren't
5 required in this filing to bring in a receiver because as
6 opposed to the uniform declaratory judgment act, it's not
7 required.

8 MR. RUSSO: Yes, Your Honor.

9 THE COURT: So you were free to basically submit
10 something without court approval -- and I understand your
11 why -- and frame the issue and ask for whatever you want;
12 and as we saw with the department of health say, "I have
13 no obligation to share that with the receiver because
14 it's not an asset of the estate."

15 MR. RUSSO: Yes.

16 THE COURT: I'm just -- again, I am just trying to
17 understand the pathway.

18 MR. RUSSO: My client has a statutory right to seek
19 a petition for declaratory order from an agency as to how
20 those prior approvals, how those final orders -- and I
21 didn't repeat it because I know you've read the papers.

22 THE COURT: Yes.

23 MR. RUSSO: But that is clearly a quasi-judicial
24 process. It is an intensive process. How does that
25 apply to this claim being made that all of a sudden, even

1 though you ruled that the -- that this liability is
2 separated from hospital ownership and operation, how I
3 now find myself in this situation. I would like to know
4 how that order applies to me.

5 Number two. And it -- my brother read it, a number
6 of paragraphs into the record, and all of them talk about
7 the transfer being proposed. How is the transfer of that
8 interest being proposed, not inconsistent with those
9 orders, and not a conversion.

10 And when I say not inconsistent with those orders
11 and not a conversion, we know from steps already taken in
12 the last couple of days the goal is to gain voting
13 control within Prospect Chartercare. And then if you can
14 do that, you can have them say "Don't oppose the
15 settlement, don't do this, deadlock," et cetera.

16 If you look at that operating agreement for that
17 entity, it was purposely designed and approved
18 regulatorily because there are only certain health care
19 purposes that that board votes on. All of this going on
20 is completely outside of that realm. So it's extremely
21 important for the regulators to answer that question of
22 how that applies to our situation.

23 We brought that to the Court's attention because we
24 think that those answers should be provided before you
25 determine to approve the settlement agreement, which

1 brings to the first question that that cannot be an asset
2 or property of the estate until you approve it. And
3 that's an admission because the receiver has sought that
4 approval.

5 THE COURT: Now is there -- so I understand your
6 argument as to the receiver.

7 With respect to these filings before the -- before
8 the department of health and the AG, I'm just trying to
9 understand this. Was the 15 percent owner, CCCB, brought
10 in or weighing in on this? Or you're saying it's the
11 85 percent owner that's --

12 MR. RUSSO: I don't know what the department of
13 health did or the department of --

14 THE COURT: Not the department of health, I am
15 talking about your client. Is it your position that "I'm
16 the 85 percent owner, I can -- I can make the request
17 directly"? I understand your argument about the
18 receiver. But I, at least on this, I don't see CCCB.

19 MR. RUSSO: No.

20 THE COURT: Okay.

21 MR. RUSSO: We can make the request directly, Your
22 Honor. I don't know what -- I was going to answer the
23 questions. I don't know how the regulatory authorities
24 are going to respond. They may set up a hearing. You
25 have to within the petition identify other potential

1 parties, which we've done. We've identified the
2 receiver. We've identified the --

3 They certainly know the ownership structure.

4 THE COURT: Sure.

5 MR. RUSSO: I don't know what they ultimately will
6 do with that proceeding. In other proceedings that I
7 have been involved with in the health care realm under
8 Section 8, they have brought and notified the other
9 parties and may have been involved in the hearings.

10 THE COURT: Yes. And now I am doing what I'm asking
11 you not to do. I am kind of getting off-track a little
12 bit.

13 MR. RUSSO: No, I understand.

14 THE COURT: So please continue.

15 MR. RUSSO: And Your Honor, the waiver and estoppel
16 argument that I just touched on, I think, is important.
17 Because you had asked if the parties answer both of the
18 questions that you posed in the negative, then does that
19 mean that the injunctive provision of the permanent
20 receivership order has not been breached. And I would
21 say that it does.

22 And then you asked the question if the answer is yes
23 to both. And my response to that is even if it's yes to
24 both, then it still doesn't mean that the injunctive
25 provision has been breached. And that's because even if

1 the settlement agreement is somehow a contingent asset or
2 property of the receivership estate, again, there's been
3 a waiver or there should be an estoppel. Again, this is
4 a court of equitable jurisdic -- or acting as equitable
5 jurisdiction. There is no statutory vehicle for this.

6 And my brother stood up before the Court arguing on
7 the petition for settlement authority. And they said
8 that all of these issues, the ones that were raised by
9 Prospect, will be litigated in the federal court. So
10 they instituted that litigation. They can't bar somebody
11 from taking steps to address that litigation.

12 And our supreme court has been very clear that a
13 petition for declaratory order is a form of exhausting
14 administrative remedies. So as part of our response to
15 that lawsuit, we have every right to exhaust our
16 administrative remedies and also make that an issue in
17 the federal court at the appropriate time.

18 They can't have, I think my brother said, he was
19 struggling with it, he used the phrase "Can't have your
20 cake and eat it, too." They can't bring an action that
21 on this record is at variance with the hospital
22 conversion act and the CEC decisions and then be able to
23 say you can't exhaust your administrative remedies and
24 try to have a determination made of the preclusive effect
25 of those decisions and whether or not what's being

1 proposed runs counter to those decisions.

2 THE COURT: But, and I phrased it in a certain way.
3 I guess my question is if the answer is yes to the first
4 two questions, does that mean that you can decide from an
5 equitable point of view and do without Court approval, or
6 is that an argument that you have when you ask the Court
7 to what will allow you to make it hereon.

8 MR. RUSSO: No, it's -- it's yes. And using
9 *Mid City* as an analogy, it's yes. And I don't need -- I
10 did not need at that time the court approval to take that
11 step. That's a step that's taken in reaction to the
12 federal court litigation alleging that despite the entire
13 HCA and CEC framework and the final order that came out
14 of that, you're still liable for the pension. And
15 that -- I've got to be able to be -- to be able to
16 address that. And that's what *Mid City* said. You can't
17 bring an action against somebody and exercise your
18 administrative capabilities under the order.

19 THE COURT: And I apologize. I guess my question is
20 a little different.

21 MR. RUSSO: Sure, Your Honor.

22 THE COURT: Which if the Court determines with going
23 through the questions -- and I understand you're saying no
24 on both -- yes, that there's some sort of a settlement
25 agreement that it's an asset; and two, that it falls

1 under what things were or are not allowed, then that
2 would -- then that would trigger you having to file an
3 application to the Court. Does it mean -- the receiver
4 being equitably estopped mean that you don't have to come
5 to the Court, does it somehow invalidate the Court's
6 order, or is it an argument that the Court should not --
7 should let us go right to the department of health and
8 the attorney --

9 MR. RUSSO: Yes.

10 THE COURT: Okay.

11 MR. RUSSO: The latter, Your Honor. I'm not saying
12 it invalidates the injunctive provision of the order.

13 THE COURT: I understand.

14 MR. RUSSO: What I'm saying what it does is it
15 estops -- it estops the process from saying, "I am going
16 to bar you from taking that step."

17 What my brother is suggesting as a remedy is that
18 the petition be forcibly withdrawn. And what I am saying
19 is that that can't be the answer because they've put
20 these issues at play in the litigation that they filed.
21 And in that litigation, you can take the position that
22 administrative remedies have not been exhausted and you
23 can try and exhaust them. That's the *Greenwich Bay* case.

24 THE COURT: No, no, I understand that. I guess
25 it's the -- the narrow issue is that the Court says if

1 it's a settlement agreement and it falls under the order,
2 then the Court certainly can say if it meets the elements
3 of contempt that it needs to be withdrawn to purge that
4 contempt and then an application could be filed with the
5 Court. And I would certainly expect that argument. So
6 that's what I am trying --

7 MR. RUSSO: But what --

8 THE COURT: Is that really an issue, issue now once
9 it's been -- once it's been filed as opposed to something
10 you could've raised if and only if the receiver opposed
11 your application.

12 MR. RUSSO: No, I think it is an issue which can be
13 raised now because the Court can take the position with
14 its fiduciary, you're estopped from making this argument
15 because you have taken the affirmative steps as in
16 *Mid-City* --

17 THE COURT: Okay.

18 MR. RUSSO: -- to bring this litigation; and
19 therefore, you can't say to this particular interested
20 party no, you can't take these steps to address these
21 issues. And that's what that case said.

22 THE COURT: And I guess what it comes back to is
23 the -- that the Court itself has an order out there. And
24 just because the receiver may be estopped from enforcing
25 the order does it allow a third party to say, "I am not

1 going to follow the order because of that." And it may
2 very well be an issue that "Look, receiver, I don't care
3 if you -- if you made this filing or wherever else, you
4 go do what you have to do."

5 MR. RUSSO: I think that's --

6 THE COURT: Yes.

7 MR. RUSSO: I would agree with that analysis, Your
8 Honor. And I think that brings back to the fact that the
9 settlement agreement is not -- and what --

10 And what we're objecting to in the settlement
11 agreement is that transfer of interest. And you can't --
12 you have to link the two. That transfer of that
13 interest, that interest at the outset of the estate was a
14 15 percent interest belonging to a third party to the
15 receivership action. Therefore, it cannot be property.
16 It only becomes arguably property because a settlement
17 agreement and which is before Your Honor and the federal
18 court to approve.

19 THE COURT: So what is -- so what's actually
20 happened at this point other than a proposed settlement
21 agreement before the Court that has caused you to rush to
22 the AG and the department of health to seek the
23 clarification? Is there something --

24 MR. RUSSO: Sure.

25 THE COURT: -- because I go back to the -- it was a

1 couple of sentences that talks about once the Court makes
2 a decision, we may have lost certain rights. So why is
3 there such an emergency to do this right now as opposed
4 to waiting for the Court to issue its decision and seeing
5 what it says? I just --

6 MR. RUSSO: Sure, Your Honor.

7 And in answer to that I cite to the *Waller* case that
8 we cite at Page 20 of our memo and in fact the receiver
9 cited in his petition or in his reply to our objection to
10 settlement instruction that says that you can -- a
11 non-party to a settlement in an insolvency or a
12 receivership context can object if -- if you're
13 threatened of being stripped of a legal right.

14 THE COURT: Right.

15 MR. RUSSO: And in this instance the receiver just
16 hasn't simply just said "Okay, we want to have this
17 transfer approved, Your Honor" and then how -- has
18 stepped back and waited. What the receiver has done and
19 we show we had -- we made a filing yesterday on an
20 emergency basis with a letter where the CCB is saying, "I
21 am following the receiver's instruction now. The
22 receiver now has this 15 percent. I want all of my
23 Category A directors to act in a certain way. If you
24 don't, I am going to remove you."

25 So the receiver is actively asking directors to

1 violate fiduciary obligations not to CCB, not to the
2 receivership, to Prospect Chartercare. And they may make
3 decisions or attempt to make decisions that what happens
4 if they do that and we have a new slate of directors,
5 certain decisions made, deadlocks are reached, things
6 can't function, and either you or the federal court says
7 "No, I am not approving this settlement."

8 This is a very real happening that's taking place
9 now. They're acting as if the transfer has taken place.
10 They've stated that to you in pleadings, they've filed
11 UCCs, they've contacted direct -- they've told directors
12 how to act, which is -- that, I think, goes far beyond a
13 situation in which well, we're contemplating this as part
14 of the settlement. That there's an immediate action to
15 take voting control, which is an active conversion. They
16 have taken steps to convert that voting control in
17 violation of Rhode Island law.

18 And that's the reason for asking the regulators to
19 voice their opinion on this undertaking and where we find
20 ourselves right now, which I don't think is inconsistent
21 with what Your Honor is doing, and I don't think it is
22 either against the receivership directly or against
23 assets or property of the receivership. Even though
24 they're acting as if it's property of the receivership.

25 And Mr. Halperin's letter was put in front of you.

1 That last paragraph clearly says the purported
2 transfer. He says this what is you're saying you're
3 doing, and it's a purported transfer. It has to be
4 determined, Your Honor.

5 THE COURT: Thank you very much, Counsel.

6 MR. RUSSO: Thank you.

7 THE COURT: Attorney Wistow, would you like to
8 reply?

9 MR. WISTOW: Yes, I would, Your Honor.

10 This whole issue of whether or not the settlement is
11 a violation of Rhode Island law is not something we're
12 asking Your Honor to decide. We're asking for the
13 settlement to go forward. We know we're going to have to
14 fight this out. We may have to fight this out, we're
15 not -- we're not sure. If we have to fight it out, we
16 think we have winning arguments. And I have bored Your
17 Honor with what they are and what are related entities
18 and so forth. What -- the basic issue is is this
19 settlement beneficial to the receivership? Is it going
20 to do something to enable us to go forward and fight the
21 fight that we want to fight?

22 Now my brother says under *Mid-City*, we can't just
23 bring -- bring suits and expect everybody to sit back and
24 do nothing, we just hammer them. Of course not. We
25 bring a suit, I'm talking about the federal suit --

1 THE COURT: Sure.

2 MR. WISTOW: -- they defend it. So one of defenses,
3 I heard him say it, was we failed to exhaust
4 administrative remedies. That's a defense in the federal
5 suit, if he wants to bring it up. But the fact that a
6 receiver sues somebody entitles that somebody to defend
7 himself in the case, not to go running around instituting
8 proceedings all over the place. That would be a
9 ridiculous result.

10 THE COURT: But if -- let's assume for a second this
11 is not a receivership but on behalf of a class you have
12 sued a client in federal court. So are you saying that
13 even though he filed an answer and he's defending or
14 filed a motion to dismiss, he is there precluded absent a
15 receivership from independently taking actions to get
16 regulatory rulings or regulatory orders?

17 MR. WISTOW: So yes. So long as you're in
18 receivership, if they want to do something, they come to
19 Your Honor --

20 THE COURT: No, no. I'm just saying hypothetically,
21 let's assume this wasn't. What you're saying is there's
22 a federal case going on right now where -- but would that
23 absent a receivership preclude them of taking the actions
24 that they're taking now?

25 MR. WISTOW: No.

1 THE COURT: Okay.

2 MR. WISTOW: No.

3 THE COURT: All right.

4 So we come back to the order.

5 MR. WISTOW: Your Honor issued an order.

6 THE COURT: Right.

7 MR. WISTOW: And I started off by saying it's a
8 basic tenet of civilization, which is starting to fall
9 apart, I might add, lately, that there is a rule of law
10 here. And Your Honor issued an order. And we are
11 getting all kinds of arguments about why "Hey, let's not
12 pay any attention to it because at the end of the day we
13 are going to win and we want the most expeditious way"
14 and so forth.

15 I am not asking, never asked you, Your Honor, I am
16 not asking Your Honor to rule that the settlement is
17 valid.

18 THE COURT: Sure.

19 MR. WISTOW: I'm not doing that. I am asking Your
20 Honor to rule that it's in the best interests of the
21 receivership. We have a high degree of confidence that
22 we're going to prevail on all of the issues we're talking
23 about. Having a high degree of confidence does not make
24 me right. But that's what, after due consideration,
25 that's what we want to do. Now I might add, Your Honor,

1 that the --

2 By the way, the business about us getting involved
3 with directors, I don't want to get too deep into this.

4 THE COURT: I don't because this was -- it was a
5 very brief, very brief conference. There's nothing,
6 nothing in the record other than, I believe, the
7 emergency motion may have been filed by Prospect. But
8 that's not -- that's not before me right now.

9 MR. WISTOW: It's not before you. But it will come
10 up, Your Honor --

11 THE COURT: Fine.

12 MR. WISTOW: -- on the next -- the next matter.

13 THE COURT: Gentlemen, I'll look forward to that.

14 MR. WISTOW: Because our position is what we did in
15 conjunction with Mr. Land was absolutely was in his
16 rights. And by the way, it was demanded by the
17 circumstances, as you'll hear, I hope, in the next
18 several weeks.

19 Now, what did the AG say about all of this? You
20 know, we have all this "The AG is going to do this, the
21 AG is going to do that." And he's basically put a paper
22 in contradicting their position. He says on Page 4:

23 "...the Attorney General observes that the Prospect
24 Entities incorrectly assume that consummation of the
25 Proposed Settlement Agreement is precluded by the

1 doctrine of administrative finality."

2 So he's already given his view on that. He said
3 flat out:

4 "See Prospect Entities' Petition. Under the
5 doctrine of administrative finality, 'when an
6 administrative agency receives an application for relief
7 and denies it, a subsequent application for the same
8 relief may not be granted absent a showing of a change in
9 material circumstances during the time between the two
10 applications.'

11 Despite the Prospect Entities' argument otherwise,
12 the doctrine of administrative finality appears
13 inapplicable to the instant circumstances for at least
14 two reasons. First, the doctrine applies only when
15 circumstances have remained the same, yet the parties are
16 now in court due to alleged 'change in material
17 circumstances during the time between the two
18 applications.' Second, although the doctrine requires
19 that the initial application to the administrative agency
20 be denied, the Prospect Entities' original application
21 for hospital conversion was approved. ('The doctrine of
22 administrative finality does not apply to the instant
23 proceeding...')

24 You know, again, I think that the most important
25 thing I have to say is here we are, I am bringing a

1 lawsuit for the receiver; and the defendant says, "I
2 don't owe the money. Don't let him bring the lawsuit. I
3 don't owe the money. He is going to lose the lawsuit."
4 That's really what we've got. We're totally aware,
5 totally aware of the issues in the case. And all we
6 seek, Your Honor, is the opportunity to pursue them.

7 By the way, the federal court, the principal
8 consideration in the federal court, apart from ordinary
9 defenses of any kind, for example, they raise *res*
10 *judicata*. They say that the decision of the attorney
11 general was *res judicata*. He doesn't seem to agree, but
12 let's say he's wrong and it is *res judicata*. They raised
13 that in front of the federal judge.

14 THE COURT: But again --

15 MR. WISTOW: Yeah.

16 THE COURT: -- the issue before the Court is I'm
17 not -- I'm not getting into those things. It's we have
18 an order. I understand you've made your arguments;
19 Attorney Russo's made his arguments why it does not
20 apply. As far as I am concerned, it comes down to should
21 they or should they not have had to come to this Court to
22 ask for relief from the injunction prior to -- prior to
23 filing the applications or were they permitted to. And
24 that's really, really what it comes down to.

25 MR. WISTOW: I only want to say all of those people

1 were on notice of what position we would take. And if
2 nothing else, in case of any doubt, they owed this Court
3 at least the courtesy of coming in and saying we don't
4 think we have to get your permission but you know what,
5 let's do it anyway.

6 THE COURT: Well, they have a responsibility to
7 comply with the Court's orders. The other things are
8 nice to have. Thank you very much.

9 Counsel, briefly is there anything else? So then
10 we're going to wrap this up.

11 MR. RUSSO: Thank you, Your Honor.

12 I just wanted to conclude with one point to
13 emphasize and that's my brother stood up again and said
14 that these issues are in play in the litigation. And
15 based on the *Greenwich Bay* case, Section 8 of the APA is
16 a unique vehicle that allows a petitioner to determine
17 application of those situations to that petitioner.

18 And in litigation, again, I -- I am -- I appear
19 here. I'm not going to be disingenuous in answers to the
20 Court. Yes, the practical answer would be yes, we
21 could've come here. However, in litigation sometimes
22 there's strategies, tactics that are important, and you
23 don't want to become embroiled in hearings of this nature
24 if you do not have to.

25 So there was no disrespect to the Court. It's just

1 a statutory vehicle that you can use to bring these
2 issues to a head when administrative remedies have not
3 been exhausted. And that ties into the litigation that
4 was brought by the receiver. And it's going have to be
5 decided. Somebody went through a regulatory process. As
6 I said in my papers, it has to mean something. Someone
7 is going to have to determine it.

8 THE COURT: And what's before this Court is has
9 Prospect Chartercare gone through a red light, or was it
10 green and they could've gone themselves?

11 MR. RUSSO: Understood.

12 THE COURT: And that's ultimately, you know, what
13 the Court has to decide. That's really the -- the issue
14 is the court order. Like I said, practice, there's
15 plenty of things in your papers that say they're not
16 filing the historic receivership practice. They get to
17 say the same thing. "Well, it should've come in to the
18 Court." That's really what I am concentrating in on.

19 MR. RUSSO: Understood. And that's why --

20 THE COURT: I appreciate that.

21 MR. RUSSO: -- my final remark was the green light
22 is Section 8, Your Honor.

23 THE COURT: Okay, great. Thank you very much.

24 The Court will reserve.

25 As I indicated to the attorneys at a conference

1 yesterday, the Court will be issuing by the end of the
2 day tomorrow a written -- written decision with respect
3 to the motion to approve the proposed settlement. That
4 will be issued tomorrow.

5 The Court will reserve on this motion. We've had a
6 lot of arguments. And the Court will bring everyone back
7 either for a bench decision or will issue a written
8 decision.

9 Okay. Thank you very much, gentlemen.

10 THE SHERIFF: All rise.

11 (R E C E S S)

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