STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

IN RE: CHARTERCARE HEALTH PARTNERS FOUNDATION, ROGER WILLIAMS HOSPITAL and ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND	)))))	KM/2015-0035

MOTION TO INTERVENE

HEARD BEFORE ASSOCIATE JUSTICE BRIAN P. STERN ON:

THURSDAY, SEPTEMBER 13, 2018

APPEARANCES:

STEPHEN P. SHEEHAN, ESQUIRE..SPECIAL COUNSEL FOR RECEIVER

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

STEPHEN F. DEL SESTO, ESQUIRE....COURT-APPOINTED RECEIVER

BENJAMIN LEDSHAM, ESQUIRE.....FOR THE RECEIVER

RUSSELL F. CONN, ESQUIRE.....CHARTERCARE FOUNDATION

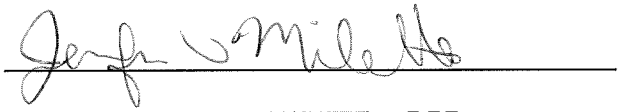
SCOTT F. BIELECKI, ESQUIRE.....CHARTERCARE FOUNDATION

ANDREW R. DENNINGTON, ESQUIRE.....CHARTERCARE FOUNDATION

DAVID MARZILLI, ESQUIRE.....FOR THE ATTORNEY GENERAL

CERTIFICATION

I, Jennifer W. Milette, hereby certify that the succeeding pages, 1 through 63, inclusive, are a true and accurate transcript of my stenographic notes.



JENNIFER W. MILETTE, RPR
Certified Official Court Reporter

THURSDAY, SEPTEMBER 13, 2018

MORNING SESSION

THE COURT: Madam Clerk, if you could call the case?

THE CLERK: Your Honor, the matter before the Court is Case Number KM/2015-0035, in re: CharterCARE Health Partners Foundation. This matter is on for a motion to intervene. Will counsel please identify themselves for the record?

MR. DEL SESTO: Good morning, your Honor. Stephen Del Sesto, court-appointed receiver.

MR. SHEEHAN: Good morning, your Honor. Stephen Sheehan, Special Counsel to the receiver and movant in this proceeding.

MR. LEDSHAM: Benjamin Ledsham. I'm also for the receiver.

MR. WISTOW: Max Wistow, your Honor, for the receiver.

MR. BIELECKI: Good morning, your Honor. Scott Bielecki for CharterCARE Foundation.

MR. DENNINGTON: Andrew Dennington for CharterCARE Foundation.

MR. CONN: Russell Conn, CharterCARE Foundation.

MR. MARZILLI: Good morning, your Honor. David Marzilli for the Attorney General.

THE COURT: We are here today on the movant's motion

to intervene. There's been much, much briefing on this issue. The Court has had the opportunity to review all of the papers as well as the cases decided. And I'm certainly prepared to hear oral argument. I've asked counsel, that it's certainly not necessary to go through everything in your extensive papers, but if there's things you want to stress, I'm more than happy to hear them at this time.

Counsel for the movant.

MR. SHEEHAN: Thank you, your Honor.

Your Honor, we are here today on the issue of whether or not the plan, the retirement plan and the receiver and the named proposed interveners are entitled to intervention right. And that's under Rule 24(a)(2).

And the standard there is the applicant "claims an interest relating to the property or transaction that is the subject of the action. The applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties."

That's the standard we have to meet, your Honor.

And before I get into the standard, there are certain rules of construction that apply to these motions. And the law in Rhode Island is it's fair -- and

indeed the Court should look to the federal courts because -- to quote the Supreme Court, "Our precedent in this area is sparse."

Now the federal rule of construction is that the statute -- I'm sorry, the rule -- Rule 24 "is to be liberally construed" with "doubts resolved in favor of the proposed intervenor." And that's **Entergy v. US, 817 F.3d 198 (5th Cir. 2016)**.

Another rule of construction, your Honor, is that for purposes of deciding the motion to intervene, the Court accepts the proposed intervenor's factual allegations as true. **Texas v. United States, 805 F.3d 653 (5th Cir. 2015)**.

Now the significance of that, your Honor, that the Court accepts the proposed intervenor's factual allegations as true means that today it is true, for purposes of this motion, that the Court was misled in connection with the 2015 sale. And, therefore, your Honor, I'm not going to go through all of the references in the petition that we contend are evidence that tends to support that conclusion.

We have affirmatively alleged in our proposed pleading that the Court was misled. It's not a conclusionary allegation because we cited the facts. So for purposes of this motion, that's established, your

Honor. And I'm not going to get into it.

It's also established, your Honor, for purposes of this motion, that at the time of the Cy Pres proceeding before your Honor in 2015, St. Joseph's Health Services of Rhode Island, CharterCARE Community Board, and Roger Williams Hospital were in dissolution. That's alleged. And we cite facts to support the contention that the entity was -- those entities were in dissolution. I'm not going to repeat what those facts are.

So what we have, your Honor, is a four factor test. The first is -- and this is the order of argument I proposed to proceed, your Honor. The first is to define the proposed intervenor's interest in the property.

The second factor is to show that the disposition in this case may impair or impede or has impaired or impeded that interest.

The third, your Honor, is that the planned interests were not adequately represented by the existing parties.

And finally, your Honor, the motion to intervene is timely. And the reason I put that fourth, your Honor, is to understand timeliness, you have to understand what interests we're asserting. And really we have to start in that order, I would propose.

Now what is the -- what are the proposed intervenor's interest in the property?

They have a legally protectable interest in the property or transaction that is the subject of the action on two grounds. First, your Honor, that the $8.2 million that was transferred to CharterCARE Foundation was a fraudulent transfer. Second, that the property should have gone to the plan under the nonprofit distribution statute for corporations, nonprofits in dissolution. And I'm going to deal with them in turn, your Honor.

On fraudulent transfer. Again, our allegations are accepted as true for purposes of this motion. And our proposed complaint and intervention attaches and incorporates the complaints that were filed in the Federal Court. And they are virtually identical minus the ERISA claims complaint that was filed in the state court.

And those allegations set the factual basis for the claim that this was a fraudulent transfer. And all of the facts, upon which -- that claimed that this is a fraudulent transfer -- is based, are established for purposes of this motion to intervene.

So I'm not going to get into, your Honor, the facts concerning the actual intent to defraud, which is one basis of fraudulent transfer or the facts that the transferring entities were insolvent and did not receive equivalent value for the 8.2 million, which is another

basis for fraudulent transfer.

Moreover, your Honor, the opposition to the motion to intervene ignores the merits of these claims. The fraudulent transferred claims. You read their opposition papers. And it's as if it isn't there. But that is a basis for our right to the 8.2 million.

The opposition wants to focus on the nonprofit distribution statute. But that's leg two. Leg one is the fraudulent transfer. And that entitles us to intervention.

So one point, your Honor, with respect to the fraudulent transfer that I want to emphasize is that we are, for purposes of this motion, creditors under the fraudulent transfer statute. And the definition by the way of creditor under that statute is anyone who has a claim. And claim is defined incredibly broadly. And all of the allegations in the Federal Court complaint and the state court complaint set forth claims.

Now -- and by the way, your Honor -- therefore, we are a creditor, not only because we contend there was a breach of contract in the failure to fund the plan, but we are a creditor because we contend there was fraud.

Now the second independent legally sufficient interest, for purposes of this motion to intervene, is the distribution statute. And that's Rhode Island

General Laws Section 7-6-51. And if I may, your Honor? I'd like to hand it up to the Court. I will give a copy to my brother.

THE COURT: That's fine.

MR. SHEEHAN: Your Honor has read the briefs and read the cases cited in the briefs. So plaintiffs -- or, rather, the proposed intervenor's arguments are known to the Court that we contend this establishes a hierarchy of payment. And that's really an exercise in statutory construction.

The meaning of "shall be applied and distributed as follows," the listing as, first, all liabilities of the corporation; and then second, third, fourth, and fifth having to do with restricted assets. The fact that in the first section that references to "all," meaning that as a predicate for getting to two, three, four, and five, you have to first pay all.

Now the case law we cited, your Honor, is the two cases from the District of Columbia -- Bankruptcy Court and the District Court affirming that decision on the basis of that Court's own opinion. And that's the only one in the country, your Honor, on this issue.

Notwithstanding this specific provision is a portion of the old nonprofit corporation model statute. My brother counted up how many states still adhere to that

version. I think his number was 17, which he considered trivial. I don't know.

But in any case, your Honor, states have been adopting the new statute. There probably will not be other cases construing that provision. Who knows. But the only law on the issue -- and it's well recent law -- is that it does establish a hierarchy.

And, your Honor, those cases make two very interesting policy arguments as to why it establishes a hierarchy in addition to the issue of statutory construction.

The first is that the services of professionals in connection with the dissolution, which is the subject of the statute, are liabilities of the corporation in dissolution. And unless they're established, they're entitled to that priority of payment under number one. The corporation may not be able to retain professionals to even put together a dissolution.

The second, your Honor, is that nonprofit corporations need to be able to use their assets in order to pay their liabilities. Now I would add, your Honor, that there's a second basis for statutory construction here. And that is, the statute on judicial liquidation.

And if I may, your Honor?

THE COURT: Thank you.

MR. SHEEHAN: Your Honor, this is Section 7-6-61 of the General Laws. And it sets forth the procedure in liquidation. Now I'm not contending that there were judicial liquidations going on at the time of the Cy Pres petition. What I am saying, your Honor, is that the identical language that I ask the Court to construe in the distribution statute also appears here and makes clear beyond any dispute that those liabilities have to be paid first.

And I'm going to refer to Subsection (c)(1). Again, (c) says, "Shall be applied and distributed as follows." The same language as the distribution statute. And (1), "All costs and expenses of the court proceedings and all liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made for that."

Now here we have a lumping together, which wasn't in the distribution statute, of the expenses of the liquidation proceeding and the liabilities. They are treated equally. They are treated the same. And as the Court knows, in liquidation proceedings the Court frequently appoints a receiver. And the receiver's fees and expenses are paid out of the estate or the entity in liquidation.

What my brother's argument would be is that insofar

as the funds of the entity in liquidation were restricted, they would go first to charities. And only if there was some -- I mean, all would go to charities. Let me put it that way. And there would be no money to pay the expenses of the proceedings in the liquidation proceeding.

Now if there's anything axiomatic, your Honor, in insolvency proceedings it's that the expenses of those proceedings are paid for out of the assets that are being handled. And my brother's argument strikes right at the heart of that because he construes the same language to imply that there's no priority.

Now I've given your Honor two statutes. There's a third statute. And that statute is the General Laws provision from the Hospital Conversions Act 23-17.14-22. Now I'm going to hand that up to your Honor. But I first want to make the observation that that statute was not an issue in the hospital conversion application. It wasn't referenced in any way. It was not raised in opposition to the motion to intervene. You can search from A to Z of my brother's memo in opposition, and you will not find a reference to that statute.

The reason I bring it up, your Honor, and the reason I suggest that it -- it will have to be addressed is at the emergency motion to extend time the other day, my

brother made it a point to hand the statute up to the Court and argue for the first time that this statute is controlling.

So I want to address this statute if I may, your Honor?

And, your Honor, I'm going to address it in terms of specific provisions. So I'd like to give the Court a photocopy of the statute and then a photocopy of the statute with certain sections highlighted so the Court has both the clean statute and the areas I'm going to be asking the Court to consider.

And by the way, your Honor, this motion to intervene was filed on June 18th. Over three months ago. And this argument surfaces for the first time last week. Now not only was this statute nowhere considered in connection with the hospital conversion application, that transaction was structured in violation of this statute. And I've highlighted in red, your Honor, the specific provisions of that statute that were violated.

The first is that the foundation that was to receive the funds had to be an independent foundation. And that's key, your Honor, because that was not done here. Instead -- and this fact, again, is true for purposes of this motion to intervene -- the sole member of the foundation that received the 8.2 million was CharterCARE

Community Board. They controlled the foundation. That foundation was not independent.

The second violation was the statute is -- of the statute was that the parties should have gone to the presiding justice. The statute expressly gives the presiding justice certain statutory powers. And those are "the authority to appoint the initial board and to approve, modify, or reject the bylaws."

The final portion of the statute they violated is the portion that says, "Members of the Board shall not receive any compensation." Paula Iacono is and always has been a member of the Board of Directors of CharterCARE Foundation. I have here their annual filing from 2016. Just to establish this as a predicate, your Honor. On page 2 lists Paula Iacono as the seventh of the seven members of the Board of Directors.

And it is undisputed that since the Foundation received the $8.2 million, Paula Iacono has been paid at this point hundreds of thousands of dollars. She takes a full salary and obtains benefits. So there's an additional violation.

Now we will prove, your Honor, in this proceeding the reason why this statute was violated. We don't have to. But we will show that it was part of the conspiracy to put money out of reach of the plan but continue to

control it.

Now the argument that my brother wants to make under this statute is highlighted in yellow. That's the portion of the statute that my brother wants to focus on, which states that, "The proceeds from the sale and any endowments, restricted, unrestricted and specific purpose funds shall be transferred to a charitable foundation."

My brother wants to argue that $8.2 million was restricted funds and was transferred to a charitable foundation. So what's the problem on the merits?

That, again, we are arguing the merits, your Honor. But I will say this, your Honor, the argument is both demonstrably false and absurd.

And I would like to first point out, your Honor, that there are five categories of -- that are addressed by the sentence I read. The first is proceeds from the sale. Second is the endowment. Third is restricted funds. The fourth is unrestricted funds. And the fifth is specific purpose funds.

All of those, pursuant to this statute, are to be dealt with the same way. No distinction is permitted under that language with respect to how that money should be paid.

And I'm going to suggest to your Honor that this statute makes perfect sense in the context of the

understanding that this occurs after the corporation pays its debts. But my brother wants to suggest that this comes in before the corporation pays its debts and can -- therefore, the 8.2 million, which should have gone to pay its debts, has to go to the foundation.

Well, that would mean that the proceeds from the sale of the hospital would have to go to the foundation. Those proceeds were $45 million and 15 percent interest in the new entities. And the -- no portion of that, your Honor, went to the foundation. Not a penny. The 45 million was received by the selling hospitals and then transmitted by them to pay their debts. They paid $31 million to cover bonded indebtedness. And they paid $14 million into the plan.

Your Honor, that fact -- to the extent that that fact is contested is supported by the resolution of the Board of Trustees of the selling parent company at that time named CharterCARE Health Partners now CharterCARE Community Board.

And if I may, your Honor?

Your Honor, this resolution provides how the selling entities will use the money, the proceeds of the sale. And it doesn't say, "Pay to a foundation." It says exactly what I said it says, your Honor.

Now if my brother is right, this whole transaction

violated the statute from the get-go. Not only that, your Honor, it would be impossible to ever convert a nonprofit to a for profit because nonprofits have debts and a portion of the sale price always goes to pay their debts.

But this statute, if my brother is right that it comes to play before debts are paid, would prevent that. So we have $45 million that should have gone to the foundation and didn't, if my brother's argument is right. Then we have the 15 percent interest in the new entities, which should have gone to the foundation, if my brother's argument is correct. All proceeds of the sale.

Then we get to another component of the phrase I read to the Court: "restricted funds." My brother argues that the 8.2 million was restricted and had to be paid to the foundation. But the statute also covers unrestricted funds. And in this case, over $23 million of unrestricted funds were retained by the selling entities to pay their debts in violation of this statute, if my brother's interpretation is correct.

And I state that total, your Honor, because it's drawn directly from the petition, the Cy Pres petition filed in 2015.

And I will draw the Court's attention to page 17. And we have a chart here, your Honor. And it shows what

they were requesting and ultimately what the Court granted. Some funds go to the foundation and some remain with the selling entities. And the totals remaining with Roger Williams were $17.1 million. And you will see some of that, in fact, was restricted funds, your Honor. In any case, it was either unrestricted or restricted.

Similarly, with respect to St. Joseph's, six-and-a-half million was retained. All in violation of the statute, if my brother's correct that the statute controls before debts are paid.

Now the fundamental rule or canon of statutory construction involved here is that courts try to harmonize the laws, if possible. And we have the statute on the distribution in nonprofits in dissolution which say you pay the liabilities first; the statute in liquidation proceedings that say you pay the expenses of the liquidation and the liabilities first. And then we have this statute that says all of the assets essentially go to a charitable foundation.

How to reconcile those and read them in harmony? And the answer is very simple: that the hospital conversions statute referenced to funds is after the debts of the entity have been paid.

And, your Honor, to suggest otherwise is to suggest when the legislature, the General Assembly passed the

Hospital Conversions Act, they intended to give nonprofit selling hospitals a discharge from all of their debts and all the assets that should go to pay those debts would go to a foundation, which is, your Honor, something you don't even get in bankruptcy. In bankruptcy you get a discharge, but the expense for that is you give up your assets.

And I suggest, your Honor, if a result that extreme were contemplated by the General Assembly, it had to be set forth in the statute. I would also note, your Honor, that this Hospital Conversions Act was passed in the context of the existence of the nonprofit distribution statute which long preceded the Hospital Conversions Act.

THE COURT: Counsel, I appreciate that. But isn't -- and I agree with you in terms of the factors for intervention and intervention as a right.

Are we going down a road right now, which is if there is intervention, all these issues the Court may have to grapple with down the road?

What I'm really looking to is -- let's focus on the question that's before the Court.

MR. SHEEHAN: Point taken, your Honor. I am going to move to the -- I think I established the interest that the proposed intervenor has.

Now I'd like to move to the second leg of the test

for intervention that the Cy Pres proceeding disposition made a factor and impede that interest.

And I would note that the statute says, "May as a practical matter impair or impede." And "may" means we don't have to prove to a certainty that the proceedings in this Court will affect our interests. We just have to show that they may affect our interests.

And I'm going to cite an Eighth Circuit case that states, "The rule does not require, after all, that the appellate's demonstrate to a certainty that their interests will be impaired in the ongoing action. It requires only that they show that the disposition of the action may as a practical matter impair their interests." And that's **Little Rock v. Pulaski, 738 F.2d 82 (8th Cir. 1984)**. And it's just the language of the statute. "May" has a meaning at all.

Indeed, your Honor, the requirements for certainty under the intervention statute run the other way. And we are going to get to that when it comes to adequate representation where I'm going to argue that the burden is on the opponent to prove to the Court's satisfaction that the representation was adequate. They have a burden to showing something to a certainty.

Now what is the effect this proceeding will have on the proposed intervenor's interests? When the petition

-- the motion to intervene was filed, it was clear. $8.2 million that the proposed intervenor's claim is theirs was paid to a foundation who had the right to spend it.

Now after that, a stipulation was entered into and made an order of this Court called Order Preserving Funds Pending Litigation. And if I may, your Honor? I'm going to refer to this. I'd just like to hand it up to the Court.

My brother has argued that this order moots any impairment with the proposed intervenor's interests that this proceeding may have going forward. The problem with that, your Honor, however, is that this only addresses part of the problem. And that's because that's all the parties could stipulate to, your Honor.

The part it addresses is the right of the foundation to spend the money. But it does not address or in any way undermine the Court's prior order saying that the foundation was entitled to have the money; that the money should be transferred from the old hospitals to the foundation.

That finding, not only is not affected by the order -- if we turn to paragraph 5 of the order, we have the without prejudice clauses that say, essentially, that this order is without prejudice to -- and the last one, "D, CCF's denial herein or in another action, including

the related actions, that the proposed intervenors are entitled to the funds in corpus."

So we still have an issue, your Honor. We have the April 20th, 2015, order of this Court, which for purposes of this motion, it is assumed was procured by misleading the Court. And we have this order saying that funds can't be spent. And I suggest, your Honor, that it doesn't address -- as I just argued -- the right of the foundation to receive the funds.

And what is the effect of that on proposed intervenor's interests?

The effect of that, your Honor, is that when we argue in Federal Court that we are entitled to the $8.2 million, the response is going to be that there was a finding in the Cy Pres proceeding that the foundation was entitled to those funds.

Now is that res judicata?

We definitely would argue it's not for a couple of reasons. First, it's not a judgment. The April 20th order is an order, not a judgment. Second, we were not in privity. Res judicata only applies to parties and their privities. And we were not in privity.

However, CharterCARE Foundation has taken the position in this opposition to the motion to intervene that it was a judgment and that our -- we were in privity

with St. Joseph's Hospital Health Services of Rhode Island because that entity was the administrator of the plan; and, therefore, the receiver and the plan are in privity with the administrator. So there's the argument for res judicata. We reject it, your Honor. But there it is.

But you don't even have to get to res judicata for there to be an impairment of our interests. This Court, a respected state court, has entered a ruling on a question of state law. It is ridiculous to assert that the Federal Court is not going to give some deference to that. And there are at least three doctrines that would justify it. Potentially.

We, again, would argue against them. And we shouldn't be required here to forfeit our right to argue against them in order to establish an impairment to our interests.

But those -- those concepts are the rules pertaining to abstention. There's the Rooker-Feldman Doctrine. There's Burford abstention. There's Younger abstention. All three of those documents have been construed by courts to prohibit a federal court from interfering with an interlocutory order of the state court. And that's what we will face when we go to Federal Court.

So there is the impairment of our interests, your

Honor. And I am not arguing the merits of our entitlement to vacate that April 20th order now because it's not before the Court. But I need to make that point so the Court understands what our interest is and how that interest will be affected.

The third factor, your Honor, is adequate representation. And the law on this is clear that that's the least difficult of the four factors for a proposed intervenor to meet. The First Circuit has said, "Typically an intervenor need only make a minimal showing that the representation afforded by a named party had been proven adequate."

And that's because, your Honor, parties are generally entitled to represent themselves. And when someone is willing to pay counsel to come into a proceeding to assert a claim, that right to represent themselves is entitled to some deference.

Now minimal argument here. Well, the standard could be absolute certainty on this one. And we'd prevail because they were giving away our money. They had no interest in putting that $8.2 million into the plan. They wanted to give it to someone else. There's a complete adversity of interests that precludes an argument of adequate representation.

THE COURT: And, Counsel, I'd say of all the memos

that went through in the cases, that there really doesn't seem to be much in terms of what's in their papers. So why don't we move on. And you certainly --

MR. SHEEHAN: Very good, your Honor.

THE COURT: -- have been applied.

MR. SHEEHAN: The fourth leg, your Honor, is timeliness. Now the first point that we are in agreement on there is that that's committed to the sound discretion of the trial justice.

The next point I would make is that the requirement is not punitive. **Wright & Miller** has the statement that, "The timeliness requirement is not intended as a punishment for the dilatory. And the mere lapse of time by itself does not make an application untimely." And that's 7C **Wright & Miller** Section 1916.

Moreover, your Honor, in cases involving intervention of right, the standard concerning timeliness is more liberal and favorable to the applicant than in cases involving permissive intervention. And that's because the ox that's going to be gored is much more clearly gored in the former than the latter. And **Wright & Miller** makes that point in the same section.

The law in Rhode Island is clear. There are two criteria that judge timeliness. And this is the **Marteg** case. "One, the length of time during which the proposed

intervenor has known about his interests in the suit without acting. And two, the harm or prejudice that results to the rights of other parties by delay."

Your Honor, the most important of these criteria is prejudice. And prejudice is to be determined, your Honor, not in view of the prejudice from allowing intervention to the proceedings but the prejudice that occurred from the time between when the proposed intervenor learned about the -- his interest in the suit and filed the motion to intervene. It's a period of time. Was there -- prejudice has occurred during that period of time when it's argued that the proposed intervenor is dilatory.

Now **Marteg** does not say knew or should have known. It says, and I quote, "has known." And my brother cites a decision by Judge Darigan which quotes **Marteg** and then says later on uses the phrase "knew or should have known."

Judge Darigan does that without reference to **Marteg**. And, your Honor, the language of the Supreme Court decision is clear. And whether Judge Darigan agreed or not -- with all respect to Judge Darigan, he's been constrained to apply **Marteg**.

I suggest, your Honor, that the law in Rhode Island is actual knowledge. But even if that were not true,

your Honor, even if this was a knew or should have known, no one could argue that the receiver should -- knew or should have known about this Cy Pres proceeding and the impact on the plan before the receivership was filed. The receiver was borne as a result of the receivership, at least in his official capacity.

Now no one can argue that the plan participants themselves, the named proposed interveners had actual knowledge that $8.2 million was transferred to CharterCARE Foundation at a time when the pension plan was underfunded. There's no evidence that they even knew that the pension plan was underfunded, much less that they were following the proceedings in the Superior Court in the Cy Pres case.

So whether it's knew or should have known, we're up to August 2017, when the petition for receivership is filed. Special Counsel is ultimately appointed. Special Counsel does an investigation and discovers the $8.2 million payment. And here we are, June of 2018, filing our motion to intervene.

What prejudice happened to my brother between some time in the fall when we learned about this $8.2 million and the effects on our interest and the filing of that motion to intervene in June of 2018?

The answer is zero prejudice. They did not show any

and they can't show any.

The last point I'd like to make, your Honor, on timeliness is that in the circumstance where a proposed intervenor had a statutory right to be included in the suit in the first instance; and not only that right was ignored, but the proposed intervenor was not given notice of the proceeding, timeliness is not a factor. And we've cited the decision, your Honor, of the Superior Court in **Toti v. Carpenter** to that effect.

I would cite a Sixth Circuit case in 1972 called **Sertic v. Cuyahoga 459 F.2d 579** that states, "In view of our determination that the Court should have given them notice of the proposed compromise to enable them to present evidence at the proper time, it appears that dilatoriness cannot stand as a ground for denial of the motions."

And that brings us, your Honor, to Rule 19. And Rule 19 is the rule regarding necessary parties. And if I may, your Honor? I'm just going to refer to a specific portion of it.

Your Honor will know that the standard for a necessary party set forth in (a)(2)(A) is the same standard that we are approving in connection with the motion to intervene; that "As a practical matter, the case would impair or impede" our ability to protect our

interests.

Insofar as we demonstrate that in this proceeding, your Honor, we are demonstrating that that was also true when the Cy Pres petition was filed. Nothing happened between then and now to increase our interests, in light of the true facts, had they been known the fund was underfunded at that time. And we were not joined as a party -- as a necessary party.

Moreover, your Honor, that my brothers, including CharterCARE Foundation, bear 100 percent responsibility for not informing the Court. And the statute -- rather the Rule 19 says in Section C, when you don't join somebody, you have to plead the reasons for nonjoinder. You have to tell the Court the names of the people you are not joining and why you are not joining them.

Had they done that, the Court would have brought the plan into the proceeding, represented by its own independent counsel, not the administer that wants to give away its assets to a foundation.

So they prevented us from being in this proceeding when we should have been in 2015. And this argument about lapse of time is completely out the window.

And that's all I have to say, your Honor.

THE COURT: Thank you very much, Counsel.

Counsel, good morning. You may proceed.

MR. CONN: Thank you, your Honor.

Can I just have a couple of minutes to set up? I have a couple of charts.

(Pause)

Good morning, your Honor. Russell Conn, with Andrew Dennington and Scott Bielecki, representing CharterCARE Foundation. And I would, again, point out that Mr. McQueen, as the president of the Board, is here in court on behalf of the Foundation.

Just two quick introductory points and I will get right into the merits. I think it bears repeating that the CharterCARE Foundation has already agreed to put the 8.2 million or so that it's been holding under a standstill agreement. We stipulated to that.

We thought it was a fair request by the Special Counsel to do that while we had a very important litigation ongoing. And we do have an important litigation in the Federal Court that's often running. There are motions to dismiss due this weekend. There's a whole briefing schedule and that court is going to be very active in adjudicating these rights.

And we've agreed to put that money in a standstill position to protect everybody's interests. And so Mr. Wistow and the Special Counsel already got a good portion of the relief when we agreed to that.

The second thing I do feel I need to say at the beginning is that the CharterCARE Foundation -- that's been run as an independent board since approximately October 2014. Its members are all volunteers. They are all unpaid. Mr. McQueen himself has put hundreds of hours into this. There was a reference to Ms. Iacono, who is a nonvoting member of the Board. She does get paid. But she's the day-to-day executive director working on a full-time basis. She gets paid as an executive director.

The Foundation is fairly leaned, as I mentioned to the Court the other day. It's about $150,000 a year. And expenses, they have very modest quarters. And they do their best to give out what turns out to be about 70 percent of the money they receive in charitable purposes.

I further point out, as to the Cy Pres order, that they get to -- they have to report to the Attorney General's Office for three years following the transaction, to submit their 990s and satisfy the Attorney General that they were operating independently.

So let me get to the merits. And let me first talk about final judgment because I think -- I think that's the threshold issue for your Honor was the April 6, 2015, Cy Pres order. Was that a final judgment or wasn't it? If it was, it's a different decision or path you have to

go down.

And we cited to what -- the well-known, perhaps well-worn, but well-known **McAuslan** case. It is an old case. But if you look in our brief, you see we cited some relatively recent cases that still cite to it. It was an equity case -- this Cy Pres action was. Thank you.

And I did bring a binder of cases to refer to in the course of my argument. I gave a copy to Mr. Sheehan before we got started. But I'd like to pass that up to the Court. Not that I intend to burden the Court with extensive argument, but the --

THE COURT: And I appreciate that. But, yes, you may hand that.

MR. CONN: Okay. Thank you.

THE COURT: And, again, just as I advised Attorney Sheehan, I've read the papers. We don't need to rehash all of the arguments here.

MR. CONN: Right.

THE COURT: You may certainly go ahead.

MR. CONN: I get that, your Honor.

So **McAuslan** talks about that the requirement that the final order or decree -- I think they termed it, too, must adjudicate everything. And your Honor's Cy Pres order did exactly that. It adjudicated everything.

McAuslan is still good law. They cite to Rule 58 in this first **Furtado** case and say, 'Well, you need a separate piece of paper to get you there.' And this is a separate piece of paper. That qualifies under Rule 58 as a separate piece of paper. It's signed by both the Court and the clerk, by Carin Miley as Deputy Clerk.

There really -- I don't know what more we would do with this document to imbue it with the characteristics of a final judgment more than it is, except if we changed the word "order" to "final judgment." Would that have made a difference if they sent in a second piece of paper that said --

THE COURT: But, Counsel, I've had my -- I've had my share of things returned back from the Supreme Court where they've said in no uncertain terms, "An order isn't interlocutory." If the side wants to obtain judgment, there is a process, even if it doesn't deal with all of the issues for all of the parties.

And I'm just -- I guess I'm a little confused. It says what it says.

MR. CONN: Right.

THE COURT: How is that a final judgment that I should give one analysis to? I mean, hey. Maybe someone should have and didn't file the paperwork.

MR. CONN: We --

THE COURT: I'm just trying to understand why I should consider that a final judgment?

MR. CONN: Because under **McAuslan**, which was an equity case, this order adjudicated everything. It is a separate paper under Rule 58. And it is signed by the clerk as required by Rule 58. And the only other thing I can even think of, if you -- if you wanted to do this and say, "It should say final judgment on petition," you would actually send in the same document. And you would just change one word: "Order" to "final judgment." And I --

THE COURT: Actually, Counsel, that isn't necessarily true. Depending on the number of parties involved. If it's not a final disposition of all of the issues in that case before the Court, there would need to be a motion. The Court would need to say for good cause shown and make an analysis of whether it's one.

MR. CONN: Absolutely. We -- you know, we all deal with Rule 54(b). But there were three petitioners here. The Attorney General was there as an interested party and joined us. Bank of America supported it at the hearing. So this did adjudicate all rights. There were no rights left for this Court to adjudicate after this order entered. There was nothing more for the Court to do.

And that's -- and that's the hallmark of **McAuslan**.

If this did go up in the Appeals Court, put a rubber stamp on it and said affirmed, there would have been nothing else for this Court to do.

And I do cite to the **Oliveira** case --

THE COURT: I saw that.

MR. CONN: -- in my original papers, your Honor. And the **Oliveira** case is right on point. And I will contrast that **Oliveira** -- Supreme Court of Rhode Island -- it's not in the binder I gave you. But it is cited in my original brief. And, you know, in equity, equity tends to use the word "decree." But they write -- the Supreme Court wrote in 2001 in **Oliveira**, with respect to a decree, "We reject semantical exactitude or excessive formalism in determining what constitutes a proper decree or order."

I would just suggest that it would turn -- like **Coen v. Corr** said -- and it would be semantical exactitude if the only reason we didn't call this Cy Pres order a final judgment is because it used the word "order" instead of "final judgment." When, in all other respects, it did everything that **McAuslan** requires.

Now they cite to the **Furtado** cases. The one case that goes against this, which is a 2004 case. But **Furtado** was a statute of limitations. Court entered summary judgment. Statute of limitations are the case --

summary judgment for defendant.

Months later the defendant says, 'Well I don't really have a final judgment with this summary judgment decision.' So he comes back. Defendant comes back and asks the Court, 'Please enter final judgment,' which the Court does. And the plaintiff appeals within the 30 days of that. And the Supreme Court said, 'That's good enough. They requested a final judgment. He appealed it in 30 days.' It's a claim for money damages.

So here, I submit that it's -- it's very clear that this order satisfies Rhode Island law on what constitutes a final judgment. Otherwise, this -- you know, you can spin this out that this order that was entered might be out there for 20, 30 years, who knows. And somebody comes forward and says, 'You know, it really didn't cover the Cy Pres.'

I don't think that it was incumbent on the lawyers for the petitioners to come back and say, 'Look. We have an order that adjudicates everything. But just to be on the safe side, let's submit something that said judgment.'

In equity, you know, you sometimes get things called decree.

THE COURT: So is it your position that once that order was entered, the appeal period set into motion?

MR. CONN: Yes. Absolutely. Absolutely. And it -- you know, if -- you get down that path and you say, 'It's a final judgement,' then the relief here under all of the cases that we cite, it's a much -- it's a much different pathway if this is a final judgment.

If it's not a final judgment, then it's an order of the Court that connects them for three years. It is subject to review on good cause if the Court is convinced it made a mistake.

But -- so let me go to the second issue, which actually does apply to both. You know, whether you view it as a final judgement or you view it as an interlocutory order that you would need to review, decide whether you wanted to alter that.

They make the argument -- proposed interveners make the argument that -- and I'm reading from their papers -- that, "The threshold reason for intervention is that the Cy Pres petition concealed the unfunded status of the plan." And that's their standard for getting an intervention. If it's a final judgment -- I will talk about that a little bit later -- but the standard and the bar is a lot higher than that.

I would like to say two things about this whole issue of concealment or misrepresentation or lack of candor to the tribunal. The first thing is, I think that

-- in fairness to what happened in this Court three and a half years ago, it misperceives the role of what the Cy Pres was about.

What happened in this case -- to back up -- is under Rhode Island law, when it's a hospital conversion, you go through an administrative proceeding with the Attorney General. You submit an unbelievably detailed application. An application, by the way, that CharterCARE Foundation doesn't submit. They were a subsidiary. But the hospitals themselves and their parent company submit the healthcare application.

They come back and forth over a lengthy period of time, almost a year, answering question after question after question, submitting financial statements. We have experts on both sides evaluating this transaction as to whether it's in the best interest of Rhode Island. And it's --

THE COURT: This is the larger issue of the Hospital Conversions Act, which I understand this is --

MR. CONN: Right. And when you look at that Attorney General's opinion -- decision of May 16th, it has all the hallmarks of an interlocutory decision signed by Attorney General, signed by the Assistant Attorney General. Rights of appeal are clearly set forth. This is in Exhibit 3 to our papers.

And the focus in that was on many, many different things. Including something I think we sometimes lose sight of now that we are focused on the pension is we had two failing hospitals. We had thousands of people about to lose their jobs. We had services -- services to the indigent ready to go out the window. They were in desperate shape.

It says that -- in the AGO's decision -- in substance. And the AGO had an expert to look at this and he said this was -- this was a fair price and it was really the only realistic option the hospitals had. It's easy to forget that today when we are focused on the pension.

But they focused for ten pages of this 60-page decision on the whole charitable funds issue. And they dealt with that. And there was a back and forth, and a back and forth, and a back and forth. And, ultimately, as Mr. Sheehan shows you, those are $32 million in charitable funds. And some pile of that was restricted and some pile of that was unrestricted.

And unrestricted is like when you write out your contribution to your college each year. You say, "Here. You do with it what you want." Restricted is when you donate, perhaps, a painting or something to hang in a -- in a hall or a classroom or something. Say, you might

restrict that gift.

And what happened in that back and forth with the Attorney General is there was a lot of discussion about this 32 million. And what a lot of people forget, and what we haven't heard today, is of that 32 million, 24 million of it did stay in the hospital to pay debt.

And I suspect -- I don't know -- that some of the 11 million is going into the settlement that's been proposed to the Court, which is an argument for another day. Most of that money went.

The 8 million that didn't go was -- after full review with the Attorney General -- was restricted funds. And as I said in my papers, I think 75 percent of those restricted funds were Roger Williams funds that had nothing to do with the pension and they were not St. Joe's funds.

So a part of that order, we -- and when I say, "we," that's probably the wrong pronoun. St. Joe's and Roger Williams had to bring a Cy Pres to deal with these restricted charitable funds. It's in paragraph 8, page 52 of the order. They told us to file that. When I say "us," again, wrong pronoun. They told St. Joe's and Roger Williams they had to file that.

CharterCARE Foundation was sort of along for the ride. They didn't have any assets. They were still

waiting for their Cy Pres money. Didn't have money to retain counsel. But they agreed to be represented by the one counsel that represented all three entities. And they came in and they filed this Cy Pres almost exactly consistent, though some minor movement of -- well, some movement of monies.

But the Cy Pres that was filed was essentially what the Attorney General had ordered them to file as part of this decision. What they filed was reviewed with the AG before it was filed. The Cy Pres was reviewed. The AG was given notice of the Cy Pres. The AG responded to the Cy Pres with a formal filing, agreeing with it in substance.

And when we had the hearing in this court on April of 2015, the Attorney General was represented -- well-represented. And they say, 'We agree with the Cy Pres. However, we want to keep our eyes and ears on this organization for three years.'

And there were recording requirements, which everybody agreed to and which CharterCARE Foundation -- so this Cy Pres proceeding was not a search to determine whether pension funds were paid, whether they were unpaid, what those were. That is a very complicated issue.

I mean, even today as we stand here, we know the

pension's underfunded, but nobody has not been paid any of their benefits yet. And so it will run out of money at some time in the future if something isn't done. We know that. But trying to figure out to what extent it's underfunded is a complicated issue.

THE COURT: Counsel, let's stick to -- as I told your brother counsel -- anything that you want to be heard, because it was well-briefed, of the four prong. Because what the Court is considering is not the 20,000 fee. It's whether or not at this stage they have the right to intervene to present their claim.

MR. CONN: Well, I get that. And what --

THE COURT: I understand you get that. But as I told counsel, let's stick to that. Because, like I said, the Court isn't ruling on the merits.

MR. CONN: Right.

THE COURT: -- of ultimately what they may be. And I understand if the Court even allows an intervention, I am sure there will be a motion filed right away that the Court should rule on issues of law.

MR. CONN: Okay.

THE COURT: But with respect to this Court. That's what I want to understand. And I think I fully understand it from your papers.

MR. CONN: All right.

THE COURT: If you want to --

MR. CONN: I will -- I will skip the next section of my argument. But if only to say that I did -- I did bring charts. And rather than go through these, I will just leave them with the Court.

THE COURT: That's fine. Thank you.

MR. CONN: To speed this along.

THE COURT: Thank you, Counsel.

MR. CONN: But what the charts show is that --

MR. WISTOW: May we see them?

MR. CONN: What counsel for the three petitioners, I would submit, have been accused of amounts to no more than perhaps imprecise or poor drafting. The idea that there was a misrepresentation about the fund -- that the pension fund would be fully-funded or paid or satisfied is just not true. And it's in -- it's in the chart that I gave you that there was 14 million of this going to the pension. Everybody knew that.

THE COURT: I guess, Counsel, do you agree with what your brother says that the Court is required to assume the factual statements as true, with respect to the intervention motion? Or should the Court be making a determination whether or not they believe those statements are true?

MR. CONN: I don't quite agree with the way he put

it. And here's why. We have an order of the Court that's been in effect for three years. We submit it's a final judgment that people have relied on; and that you ought not to be able to come into court without overcoming one of two thresholds here to get to -- to open up that order. If it is a final judgment, then we are going down the 60 -- the 60(b) path.

THE COURT: Right.

MR. CONN: I understand from their reply brief they are not relying on 60(b)(3). But they are relying on the sort of inherent catchall phrase of 60(b); that this has to be a fraud on the Court.

And in my binder -- because this argument did not get clearly made in their original papers and we didn't have an opportunity for a cert reply, I included some material on fraud on the Court in that binder. And one of them is **Wright & Miller**, which I know Mr. Sheehan just cited to.

But it is an extraordinarily high burden to open up a judgment for fraud on the Court. When you read them, it's like bribery of a judge or a total subversion of the judicial process. It's not bad drafting.

So we say that -- you know, they say fraud has to be pled with particularity in the rules. We say those pleadings fall far short of showing their interest,

certainly on a 60(b) standard, but even on the intervention standard.

This sort of entered because it was an extension of the Attorney General's decision to deal with $32 million of funds. 24 which were agreed to be left behind and 8 which was sent.

So, you know, we think -- we think you shouldn't just say -- well, that they alleged, you know, that the Court was misled. I think -- the whole basis for their statement that the Court was misled -- you have the document. They've had it up -- the Cy Pres petition. They refer to nothing other than the Cy Pres petition in their petition to intervene.

The Court can look at the Cy Pres petition and look at the Cy Pres order and can decide for itself whether they met the more stringent elements of showing fraud on the Court to get relief from a final judgment, which they're far, far short of that.

And I'd submit -- just looking at the four corners of that Cy Pres and the Cy Pres order, and keeping in mind what the purpose of that Cy Pres action was, again, they are -- they are far, far short of that.

I will talk a little bit about the timeliness issue.

THE COURT: Sure.

MR. CONN: And the prejudice issue. We do say it's

a knew or should have known standard. We've already heard that Rhode Island precedent is sparse. And we often look to the Federal Court. We do cite a First Circuit -- a relatively recent First Circuit on the knew or should have known.

There was nothing more public, I would submit, in 2013 and '14 when we were discussing the fate of these hospitals as to what would happen to these hospitals. And, certainly, the AGO's decision was a public document. It was available on its website from the beginning. It's available today.

And, again, back then everybody thought that this was a great idea to support this transaction or otherwise these hospitals would have closed. And so the whole idea that 7 or 8 million dollars in Cy Pres money was going to be coming through a Cy Pres petition was published by the Attorney General. And that was -- that was a fact. Publicly known.

Second, the prejudice. We've talked about that; that these monies -- and CharterCARE Foundation was not set up as a new foundation. But it was supposed to be an independent foundation. That was the gist and thrust of the Attorney General's order that they should be independent. That's why they all had independent boards.

This issue of membership is, I think, a red herring

for today. It is an issue for another hearing. But, clearly, this Board for the last four years, since about October 30, 2014, and certainly since they got the Cy Pres money in April 2015, has relied on that order. This Board meets four times a year. They take in applications for funding for good causes. They fund it.

If you -- if you think about Cy Pres orders, and if people can't rely on them, what good are they? I mean, you need to be able to rely on them to go out and do your business. People move forward and that has happened.

The other thing I would say on the timeliness issue is we cited to the **Gannon** case, a 1998 Rhode Island case. And the burden of proof on timeliness is significantly higher if the Court agrees that the Cy Pres order is a final judgment. That's referenced to, quote-unquote, "an exceptionally heavy burden."

The other -- the other issue about -- they're claiming an impairment of their interests. And I think this is probably -- to me, this strikes -- I submit, it strikes at the heart of sound judicial administration, good judicial administration. They have a 133-page, 455-paragraph, 21-count complaint in the Federal Court before the Chief Justice of the Federal Court.

THE COURT: And, Counsel, one less count before this Court as well, which this Court has agreed to stay, which

could be re-visited at another point.

Do you know what I'm saying?

MR. CONN: I don't actually.

THE COURT: You don't?

MR. CONN: I'm not sure what you are referring to --

THE COURT: That there were two litigations that have been filed.

MR. CONN: Oh, sorry. Yes. Okay. I got that. Sorry about that.

So they -- they have a full and fair and total opportunity to litigate all of these claims before Judge Smith. And they will do that. And they will do that effectively, aggressively and capably. I don't have the slightest doubt about that, knowing the capabilities of Special Counsel and his office.

And what they say is -- in their papers, they talk about a quote-unquote real possibility that they could be prejudiced if the Court doesn't undo this order. And I would submit that that's too slender a read to get down -- to base this on.

They will argue to Judge Smith that this order isn't binding. We already heard some of that -- that res judicata. They are not a party. So whether this hurts them or helps them, who knows. But they made the decision, not me. They made the decision that the

Federal Court would be the locus where they adjudicated all of these claims.

And if this Court were to open up this -- allow this motion to intervene and open up and have -- I don't think you can vacate an order based on allegations in a complaint that you are taking largely as true. You would need discovery. You would be deposing lawyers. You would have an evidentiary hearing. And, ultimately, you would put the Court in deciding the very issue that they've asked Judge Smith to decide.

THE COURT: But on this limited issue, isn't the state court the appropriate place to determine whether or not an order issued by the state court should be disturbed?

MR. CONN: Disturbed if you felt that the standards -- well, if it's a final judgment, it disturbs only if you felt there was a fraud on the Court.

THE COURT: Whether -- if I accept your argument, wouldn't the state court that issued the order on this separate case be in the best position to make that -- to make the determination of whether or not that order should be disturbed?

MR. CONN: I'm not sure, your Honor. The Federal Court is pretty capable. They've alleged in that court that the order shouldn't be given effect. They've

alleged that they are not bound by the Court. That was their choice to go there.

THE COURT: Well, they actually -- they filed in Federal Court and they filed that claim in the state court.

MR. CONN: Well, but they did -- but they chose what allegations and paragraphs and counts would be in the Federal Court complaint. And they said it -- if you read their memo on their motion to intervene, they say it right in the memo. 'We bring this petition for a very limited purpose. A and B.' They've already got B.

In A -- in order for your Honor to deal with A, your Honor is going to have to deal with all of the issues that Mr. Sheehan just started going through painstakingly, which I will spare the Court on.

But this issue on whether unsecured creditors, if they are creditors, take a priority over restricted gifts to charity, if we were in the Supreme Court of the United States on that today, we'd have 100 amicus briefs from both sides of the aisle.

THE COURT: Sure.

MR. CONN: This is about as hot an issue as there is. And -- respectfully, I don't see how you can decide -- I don't see how this Court can decide whether that order should be vacated without getting to the merits of

that. They either have an interest or they don't.

THE COURT: Which, I think, in reading your papers as well, in terms of a reading and an interpretation of state law.

MR. CONN: Correct. Correct.

But we've got a federal -- we've got a Federal Court complaint with 21 counts. I think 4 or 5 are ERISA and the other 16 are state law.

THE COURT: Which are the same counts before this Court in this state actually.

MR. CONN: Correct. Correct.

But they've chosen to stay that state action so they can give life to their ERISA claims.

THE COURT: What I'm trying to say is there was an agreement among the parties to stay the action.

MR. CONN: Correct. But it is stayed. And all defendants have agreed that the Federal Court will be the operative locus to adjudicate certain facts.

THE COURT: You think Judge Smith may decide in terms of the nonfederal claims?

MR. CONN: Well, we don't know. And, you know, frankly, that's a reason for this Court to tread very cautiously, I would submit, respectfully. You know, there is a certain urgency, it seems, to everything that happens.

But, again, the CharterCARE Foundation money is safely with the Rhode Island fund.

THE COURT: And I understand that.

MR. CONN: So, you know, to wade into that and have this Court adjudicating charitable rights on restricted funds versus rights of unsecured creditors, where they have said, 'We are not looking for this Court to decide that. We are looking for the Federal Court.' They haven't asked your Honor to decide that. They've asked the Federal Court to adjudicate that.

The only thing they want you to do is take that April 12th -- what we say is a final judgment -- and just rip it up so that maybe it won't, in some way, give them an issue in the Federal Court.

And we say the Court ought not to do that based on the showing that has been made that is woefully short on Rule 60(b) standards. And we would submit it's untimely and prejudicial; and that their interest -- you know, they have to have an interest. Their interest isn't great enough.

Their interest is -- they may not get the same result in the Federal Court that they'd like to have because they are afraid that somehow this order -- for your Honor to undo that order, I mean, you talk about a can of worms. This is a dumpster of worms. To go in and

start to depose lawyers and have a hearing on whether this Court was either defrauded or misled. I would submit, the Court ought to wait on that. There's no urgency to address that.

THE COURT: But going back -- and I've kind of gone through this a little bit. But, really, the issue before the Court is should they have the ability to, at least, present that within the action.

MR. CONN: And I would submit that, at most, you -- I would submit that the Court ought to defer that. The degree of speculation, the degree of harm here is entirely speculative.

There's some issue. And your Honor is going to see this by Monday. There's a significant issue even to the standing of the receiver to bring these claims. And if you look in their reply brief at page 38, there's a tiny little nugget in there that says that the PBGC may step in at some point and cover this.

And it's a very simple and elegant argument that Mr. Wistow has said in Federal Court that this pension plan was no longer a church plan after the SF purchase and sale. If it's no longer a church plan, then it's an ERISA plan. And it's -- if's an ERISA plan, then everybody in this courtroom ought to be very happy because that means the full faith and credit of the

United States of America will stand behind any pension shortfall.

THE COURT: I appreciate you said that on the record because if it is determined to an ERISA claim, I guess you are saying that automatically the PBGC must take over coverage?

MR. CONN: Correct.

THE COURT: Okay. Very good.

MR. CONN: And then they would own the claims. And all of this Sturm und Drang -- we are going to decide whether or not that order should stay or not stay.

THE COURT: I want to be very clear that that's the opinion of counsel; that as the pensioners, there's a process involved. And we will see what happens. Okay.

Anything else, Counsel?

MR. CONN: Thank you very much, your Honor.

THE COURT: Thank you very much.

Briefly, Counsel, is there anything you wish to respond to?

MR. SHEEHAN: Yes. There is, your Honor. I'm just going to let my brother get out of the way.

MR. CONN: Thank you.

MR. SHEEHAN: I'm going to limit my remarks to, obviously, what my brother said.

First, on this issue of final judgment. He says,

'You need a separate piece of paper and we have one.' The separate piece of paper is that rule is separate from the order. You need a judgment on top of an order. He puts the order out and says, 'We have a separate piece of paper.' That's like Alice in Wonderland, your Honor. The order is not a separate piece of paper from the order.

Now the issues of fact that my brother just argued to the Court. I listed them. There are over 30. The issue of whether there was fraud on this Court. My brother's arguing that. For purposes of this motion, there was fraud on this Court.

My brother says, 'Well, because it's based on a petition, then that rule about accepting the factual allegations as true does not apply.' He cites no law for that opposition.

Moreover, your Honor, it's not just based on the petition. There was a hearing before your Honor when counsel explained what was happening to your Honor, which we claim constituted fraud. It's not just the petition.

And this whole idea that because it's in a petition it's not accepted as true -- that the language in the petition was intended to defraud? Well, that's a question of fact. Was that intended to defraud? Is that apparent from the petition?

You can't tell looking at the document itself. It's certainly not foreclosed.

Then the argument is that the Attorney General's decision somehow adjudicated this whole matter. The Attorney General said, 'Go to the Superior Court and file a Cy Pres petition.' This Court had the power and the right and the duty, if properly informed, to make the right disposition regardless of what the Attorney General said in his opinion about these funds.

The hospitals were -- he says that in the petition, your Honor, CharterCARE Foundation was "along for the ride." They were along for the ride to get the money, your Honor. And they were represented by the same counsel that was asking the Court for relief to give the money. And one of the other petitioners was their member. And Paula Iacono worked for St. Joseph's in figuring out what was charitable or not, and then put on the other hat of running the Foundation.

The idea that they were "along for the ride," your Honor -- all of these entities are so nested together and tied up together in a web of fraud is what the plaintiff alleges. But it's indisputable that factually they are all intermingled. Along for the ride?

THE COURT: Counsel, let me ask you a question.

MR. SHEEHAN: Sure.

THE COURT: One concern I had. The receiver, who was appointed from the state, steps into the shoes in terms of rights and liabilities. So I'm just trying to understand on the timeliness issue. Why do you argue that it's just since the investigation uncovers it as opposed to why does the receiver somehow have an upper hand compared to what the plan participants may have been?

MR. SHEEHAN: Your Honor, I made the argument on two levels. The receiver and the named plaintiffs, who are participants in the claim. I made on both levels. There's a lot of law, your Honor, involving a lot of the credit union cases where receivers are not held to have the knowledge necessarily if there has been fraud. We haven't gotten to that issue, your Honor.

THE COURT: I'm not saying that they had to have the knowledge.

MR. SHEEHAN: Yes.

THE COURT: The question is: Does the receiver step into the shoes, as far as the rights of the parties? They don't get -- they don't get extra rights just because they are appointed.

MR. SHEEHAN: Well, your Honor, certainly in the federal context the receiver does.

THE COURT: Right.

MR. SHEEHAN: The FDIC, acting as a receiver does -- is not bound by the acts of the bank. There's the D'Oench Duhme Doctrine -- if I pronounce it correctly -- which basically says they get to start afresh. We haven't gotten into that, your Honor. And they haven't raised it.

THE COURT: I understand.

MR. SHEEHAN: Now, again, the Rule 60 path my brother talks about. That's if the motion to intervene is granted. The Court isn't deciding whether we have the right to make a Rule 60 motion in connection with the motion to intervene. And if the Court is, the Court has to assume, for purposes of that analysis, that there was a fraud on this Court. And to say that a judgment can't be vacated under Rule 60 where a fraud on the Court is proven is absurd.

And by the way, your Honor, we also rely on the inherent power of a Court to vacate its own decisions on the showing of it having been defrauded or deceived.

My brother actually says the pleadings are insufficiently particular to demonstrate fraud. At the same token, he talks about a 135-page complaint, 400-some odd paragraphs. Your Honor, the complaint is incredibly detailed. That is just a throwaway argument from my brother.

He argues that the AG's decision was a public document, which somehow the plan participants are deemed to know about. What if the AG was defrauded? That's our point.

And, moreover, the AG's decision does not expressly know that the plan is underfunded. That's not telling the plan participants that there's a problem with their pension. To the contrary. If reading that decision, they would have assumed if there was a problem with their pension, the Attorney General would have discussed it. And he didn't.

Your Honor, we put a lot of information before the Court factually about the Hospital Conversions Act proceedings and how misrepresentations were made in connection with those proceedings. For purposes of this motion, and, again, it has to be assumed that the AG was defrauded.

Now my brother says that the Foundation Board has relied on this for four years. Someone who steals money relies on the fact that they have the stolen money and spends it and lives whatever life they choose. But that reliance does not give them a right to the money. That's a bootstrap argument if there ever was. If the Foundation obtained its money by fraud, its subsequent reliance on that charade perpetrated on the Court is no

basis to give it any deference.

Now my brother talks about -- he claims that the A part of our prejudice, which is that the Court's determination that they were entitled to the money, is an insufficient or "too slender of a read" for the Court to rely on to show A; that the disposition in the Court's order may, as practical matter, impair or impede our interests.

I don't hear my brother saying, 'I waived the argument.' To the contrary. His papers make the argument that there's res judicata; that this is a final judgment. My brother's talking out of both sides of his mouth. On one part of his argument, it's a final judgment and the Court has to apply this very strict standard. And on the other part of his argument, we have no beef here because the Federal Court can figure this all out. There's no impact from the state court decision.

Now we told the Federal Court that we were coming here. And we did that, your Honor, in the actual complaint in the Federal Court. Acknowledging in the complaint that we were coming here because of the possibility that some preclusive effect may be given to this Court's order of April 20.

We felt and continue to feel it was unseemly to ask

the Federal Court to vacate an order of this Court without first coming to this Court and, moreover, telling the Federal Court we are coming to this Court.

And my brother dodged that question, your Honor, as -- which was who should decide whether this Court has been defrauded? It just answers itself, your Honor. My brother talks about this case being so "hot." Too hot and too complicated for -- implying it's too hot and complicated for this Court. Well, why is this Court not able to decide those issues in connection with a legitimate motion to intervene?

Now my brother states that the Court should even stay away with construing the distribution statute. Well, insofar as we claim an interest as a predicate for our motion to intervene, it's, in part, 50 percent based on that statute.

And either the Court has to assume that we are entitled to that interest and look at the statute and decide. The Court can't simply say, 'I'm not going to look at the law that I need to to determine if you have an interest because that issue is also relevant on the merits of whether the money should go to you.'

I mean, obviously, in a motion to intervene, whenever a party has to define its interest, it has to do so in terms of the ultimate merits of the case. We have

the right to come in because we claim that we were defrauded. The Court has to either accept those allegations as true, if they are factual; or if there are questions of law and there's any issues, the Court can decide it.

Now my brother refers to the Federal Court case as -- what he calls "a dumpster of worms." Your Honor, I don't want to characterize what we consider the defendants in the Federal Court case to be. And I don't want to characterize what we consider what happened before the AG and before this Court to be other than to say it constituted as fraud.

That's all I have, your Honor.

THE COURT: Thank you.

Counsel?

MR. SHEEHAN: Your Honor, just one point. My brother -- if I may your Honor? If I may very briefly? Mr. Wistow asked me to make a point and he is quite correct.

THE COURT: Go ahead.

MR. SHEEHAN: Your Honor, this argument that there's no pending case. This stipulation -- an order was filed in the pending case. And they treated it as a pending case. If there had been a final judgment, this case would have been closed four years ago.

MR. CONN: --

THE COURT: Normally this is where we end. I will give you a minute if there's something.

MR. CONN: Thank you.

Your Honor, after 41 years, and I don't talk out of both sides of my mouth. I take my pro hac vice seriously. I do the best that I can to try to present myself candidly with the tribunal.

Number 2, we will be filing a motion to dismiss in the Federal Court on the grounds of the allegation of fraud. The CharterCARE Foundation are not alleged with particularity. There's a lot of fraud about other people, perhaps, but not against us.

Referring you to the D'Oench Duhme Doctrine, I think, is not on point. In the mid-1990s, I represented the FDIC. We D'Oench'd everything. But there was a federal statute in a Supreme Court case. That's what we did to win cases. It doesn't apply here.

And the final thing I will say is -- this bothered me Friday when they said it and now they've said it again that -- this hyperbolic statement that we stole the money. They are holding this money pursuant to a valid court order as stewards of the money. We take our obligations seriously. We put the money on a hold. We didn't steal anything. We got the money after a valid

court order.

And if -- through all of this judicial process, it's decided that they are entitled to the money, they will get it. But there's no need for hyperbole and personal attacks against me or CharterCARE Foundation. I had to read about that in the local media on Monday. So -- that's not why we are here.

THE COURT: Counsel, as I've said before, and I understand we have oral arguments and sometimes content -- comments are made. What the Court is concerned about is the motion to intervene before the Court. The elements that have been laid out by the Court in terms of the motion to intervene.

And I understand there are, certainly, some legal disputes. Probably the largest one, which may be -- which is: What is this order, judgment, whatever you want to call it? And then what analysis does the Court go down? And I understand that what we have at this point are allegations that were made.

The Court does want to issue a bench decision quickly so we have a resolution. I want to take into account some of the arguments made. The Court is prepared. There will be no further argument or no further papers submitted.

The Court will set down this matter for next week

for a bench decision only on the motion to intervene. I know the Court has some availability in the morning on Monday. But what I'm going to ask counsel to do is please see the clerk when I recess from the bench to coordinate a time. Again, this is just for a bench decision so the Court can issue a bench decision on this case.

The Court will be prepared to do so Monday or later next week. Okay?

The Court also will be issuing an order today dealing with the scheduling in terms of when things will be due with respect to the other motion that's before the Court in October, which is the petition on the proposed settlement.

Counsel, thank you very much.

Court is in recess.

(A D J O U R N E D)

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