HEARING DATE: OCTOBER 25, 2018, 9:30 A.M. (STERN, J.)

STATE OF RHODE ISLAND PROVIDENCE, S.C.		SUPERIOR COURT
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
vs.	:	C.A. No.: PC - 2017-3856
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, As Amended	:	

MEMORANDUM OF LAW IN SUPPORT OF PROSPECT CHARTERCARE, LLC'S OBJECTION TO THE RECEIVER'S MOTION TO ADJUDGE PROSPECT CHARTERCARE IN CONTEMPT OF COURT

The Receiver's motion seeking to have Prospect CharterCARE, LLC ("Prospect") held in contempt is a tremendous overreach. The Receiver brought this motion, because Prospect has asked the relevant state regulatory agencies that approved the current ownership structure of the two hospitals and related health care facilities, whether the proposed Settlement Agreement's effective transfer of a 15% interest in Prospect to a new party – the Receiver – violates those approvals. It is extraordinary that the Receiver would take the position that Prospect is precluded from seeking, and indeed is in contempt, merely for having sought the input of the Rhode Island Department of Attorney General ("RIAG") and the Rhode Island Department of Health ("RIDOH") on the legality of the transfer of interest that the Receiver's proposed Settlement Agreement contemplates. In doing so, the Receiver has taken a wholly unsupportable position in which the order placing the pension plan into receivership and appointing the Receiver is somehow transformed from a shield against litigation into a sword by which the Receiver's actions cannot be subject to review by any body other than this Court. Actively attempting to prevent regulatory review in such a highly-regulated area as hospital ownership, makes this matter even more

astounding. It certainly was not the intent of this Court to divest the RIAG and the RIDOH of their regulatory authority and the Receiver's efforts to hold Prospect in contempt for seeking such review and input should be soundly rejected.

As this Court is aware, the Receiver has entered into a proposed Settlement Agreement – without approval either by this Court or by the Federal Court – under which CharterCARE Community Board will hold its 15% interest in Prospect "in trust for the Receiver," and the Receiver "will have the full beneficial interest therein." See Settlement Agreement ¶ 17. In furtherance of the Settlement Agreement and again, without approval, the Receiver has actually gone forward and filed UCCs with regard to that transfer. Prospect believes that this transfer of interest is in violation of the governing transactional documents that were reviewed, approved and adopted by reference in the final decisions of the RIAG and RIDOH.

Accordingly, on September 27, 2018, pursuant to R.I. Gen. Laws § 42-35-8,[1] Prospect filed Petitions for Declaratory Order ("Petitions") with the RIAG and the RIDOH, seeking a determination as to the preclusive effect of final decisions under the Rhode Island Hospital Conversion Act ("HCA") and Rhode Island Hospital Licensure Act (known as "CEC" or "Change in Effective Control") issued by the RIAG and RIDOH on May 16 and 19, 2014, respectively.[2] The Petitions also requested a determination of whether a purported transfer of a fifteen (15%)

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[1] R.I. Gen. Laws §42-35-8 provides, in pertinent part, as follows:

> **§ 42-35-8. Declaratory order.**
> (a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency **applies to the petitioner.** (emphasis supplied).

[2] The HCA is found at R.I. Gen. Laws §§ 23-17.14-1 *et seq.* and the CEC is found at R.I. Gen. Laws § 23-17-1 *et seq.* There are also regulations that are applicable.

percent membership interest in Prospect being proposed and allegedly undertaken by the Receiver is, as a matter of law, a conversion as that term is defined by the HCA.

The Receiver's motion to adjudge in contempt was brought in response to Prospect's efforts. According to the Receiver, the injunctive provision of the Permanent Receivership Order combined with the interest that the Receiver "acquired" through the proposed Settlement Agreement, and the UCC-1 that he immediately filed upon the Settlement Agreements "execution", means that Prospect cannot seek this regulatory review. Frankly, this is a manufactured scenario that cannot be upheld. As explained below, Prospect's petitions do not affect any property or interest of the Receivership Estate, and this Court should not only deny this motion for contempt but should also order the Receiver to participate in these petitions because the transfers that he purports to effectuate under his proposed Settlement Agreement directly implicate the regulatory approvals obtained in establishing the current hospital ownership structure.

I. FACTUAL BACKGROUND

Prior to 2009, Roger Williams Medical Center ("Roger Williams") was operating a 220-bed acute care, community hospital and a nursing home, both located in Providence, Rhode Island. In turn, St. Joseph Health Services of Rhode Island ("St. Joseph") was operating a number of specialty clinics in Providence, and Our Lady of Fatima Hospital ("Fatima Hospital," or collectively with Roger Williams, "Hospitals"), which was a 278-bed acute care, community hospital located in North Providence, Rhode Island.

In 2008 and 2009, Roger Williams and St. Joseph were losing in excess of $8 million a year from operations alone.[3] In an effort to stem such loses, those independent systems agreed to

[3] The factual statements in this introductory section are public record and are set forth in Conversion and CEC dockets which have all been subpoenaed and reviewed by the Receiver.

affiliate through the creation of CharterCARE Health Partners ("CCHP").[4] The purpose of the CCHP affiliation was to realize approximately $15 million in savings over five (5) years, utilizing efficiencies created by the combined hospital systems. In 2009, the CCHP affiliation, was approved by RIDOH and RIAG. If the CCHP affiliation had not been approved, there was a substantial likelihood that the Hospitals would have failed.

As a result of the CCHP affiliation, significant operational efficiencies were achieved. However, based on operating revenue alone, the combined CCHP systems were still suffering operating losses of approximately $3 million per year by 2012. Moreover, that operating loss did not include considerable losses being sustained as a result of the St. Joseph's Pension Plan (the "Pension Plan"). Furthermore, CCHP's effort to reduce operational losses did not address the need for access to capital. Accordingly, absent some type of capital infusion, the CCHP system had a substantial likelihood of failure.

The failure of the CCHP system would have been catastrophic: it contributed over $500 million per year into the State's economy, employed approximately 3,000 people, and provided substantial free medical care every year to those who could not otherwise afford such care. In addition, CCHP's host communities (Providence and North Providence) received substantial payments from the State of Rhode Island in lieu of taxes for hosting these non-profit healthcare institutions. Just as the City of Woonsocket, the Town of Westerly, and the regulatory community undertook a team approach to save acute care community hospitals in those communities, the medical and regulatory communities were more than willing to support an effort to seek private capital to save CCHP system and not have it go the route of Memorial Hospital and the difficulties the City of Pawtucket is now facing.

[4] CCHP is now referred to as the CharterCARE Community Board.

Utilizing language familiar to the Court, CCHP was in a death spiral. CCHP had two choices – either wind down or undertake some type of orderly sale process. Unlike Landmark Hospital and Westerly Hospital, CCHP conducted an internal "RFP" process at a time when it still had enough of a safety net of operational cash on hand. As a result of that process, Prospect Medical Holdings, Inc. ("Prospect Medical") assembled an "Acquiror" structure, which included Prospect, and offered to purchase the assets (but only assume certain liabilities) of the CCHP system as follows:

1. Form Prospect in order to maintain the community hospital mission established by CCHP;
2. Pay $45 million at closing to satisfy operational debt of the CCHP system;
3. Commit a future "long-term capital contribution" of $50 million (in addition to routine capital investment of at least $10 million per year);
4. Utilize the long-term capital commitment for specific capital improvements;
5. Maintain essential medical services for at least five (5) years, post-conversion; and
6. It was made abundantly clear in the transactional documents submitted by the parties to the RIAG and RIDOH that the Acquiror would not acquire the Pension Plan or assume any Pension Plan liability. As such, the Pension Plan and any and all liability associated therewith would be separated from the Hospitals' ownership and operation and remain with the Acquiree.

Just as if Prospect Medical had made that offer through a Receivership proceeding, the offer had to be subject to intense regulatory scrutiny and approval under the HCA and CEC processes pursuant to the statutory jurisdiction of RIAG and RIDOH and subject to full rights of appeal. RIAG and RIDOH exercised such jurisdiction, reviewed the transaction, consolidated

CEC and HCA proceedings, received expert review, conducted full hearings before the Rhode Island Health Services Council, engaged in related Superior Court proceedings, and ultimately approved the conversion with the Acquiror not being responsible or assuming any Pension Plan liability.

The experts engaged by RIAG and RIDOH were very candid in their review of the transaction, making it clear that the Acquiror was not assuming any liability for the Pension Plan. The expert for RIDOH specifically stated that the $14 million of the purchase price being deposited by the Acquiree into the Pension Plan would simply reduce the Pension Plan's then-disclosed deficiency of $79 million. Moreover, RIDOH"s expert specifically testified before the Health Services Council as pursuant to the CEC proceedings, that there was no actuarial support as to the Acquiree's representations regarding Pension Plan funding requirements going forward, post-Conversion. In turn, it was made clear and confirmed by the Health Services Council that the Acquiree would carry the risk for Pension Plan funding and liability, post-Conversion.

RIAG's expert also made it clear that the Hospitals would not survive if they remained linked to Plan liability. In enacting the HCA, the General Assembly's intent was to review and approve private investment in not-for-profit hospitals, in large part, to ensure the hospitals' survival. In accord with the reports of the financial experts, the final HCA and CEC decisions undertook a balancing analysis and determined that the Hospitals would not survive if Pension Plan liability remained coupled to the Hospitals. This is especially evident in the Final HCA decision issued by RIAG which provided in part as follows:

> Significant operating efficiencies have been achieved as a result of the 2009 CCHP affiliation. Based on operating revenue alone, the combined CCHP hospital system reduced operating losses not including pension losses to approximately $3 million per year. Although a significant improvement, CCHP realized that the losses that it was continuing to experience cannot be sustained and still

> ensure its continued viability. Furthermore, although capital expenditures have been made, the physical plants at the Existing Hospitals were aging and need upgrading.
>
> Of additional concern to CCHP is its pension funding (an issue that is impacting many hospitals throughout the country). If pension losses are taken in consideration, in fiscal year 2012, the CCHP system sustained losses of over $8 million which are increasing without additional contributions. Such losses cannot be sustained by CCHP. Facing these significant financial concerns, CCHP realized it needed additional capital to ensure its continued viability to fulfill its responsibilities to the citizens of Rhode Island which it serves.

In short, RIAG recognized that Pension Plan liability had remained attached to Hospital ownership and operations as a result of the 2009 CCHP affiliation and as of 2014, the Hospitals were failing, in large part, due to that fact. Therefore, the Prospect Medical's structure and offer to purchase the assets of the CCHP system had to be approved in a manner that separated the Pension Plan liability from the Hospitals' ownership and operation. If not, there would still exist issues with Pension Plan funding and the Hospitals would have failed. Thus, the CCHP submitted a Petition to this Court and alleged that the Acquiror "**had no role in the evaluation of the Plan or its funding level**" during the Conversion or thereafter and, the Acquiror did not "**assume [ ] the Plan or any liability with respect thereto as clearly stated forth in the asset purchase agreement among the parties.**" *See* Petition for Appointment of a Receiver at ¶ 4 (emphasis supplied).

Despite that regulatory history and the admissions by CCHP, the Receiver has instituted two lawsuits alleging that the Acquiror has Pension Plan liability, without first seeking any type of relief or ruling from the appropriate regulatory agencies as to the preclusive effect of the HCA and CEC proceedings. In effect, the Receivership has completely ignored the regulatory jurisdiction and authority conferred by statute that is attached to a hospital conversion and opted for litigation in court instead – and now that Prospect has sought to involve the relevant regulatory

bodies, the Receiver takes the audacious step of seeking to have Prospect held in contempt for having done so. The Receiver's approach is at complete variance with prior healthcare receivership proceedings in the Rhode Island Superior Court.

Now, as part of the proposed Settlement Agreement with CCHP, the Receiver took it upon himself to attempt to effectuate a transfer of interest that appears to be a conversion under the HCA. Accordingly, Prospect filed Petitions under R.I. Gen. Laws § 42-35-8 to request that the regulatory agencies with statutory jurisdiction apply the prior, relevant HCA and CEC decisions to Prospect. Although the Receiver is seeking to hold Prospect in contempt for having instituted these regulatory reviews, this Court should instead order the Receiver to participate in them fully in recognition of the important role of the state regulators in overseeing and implementing the Legislature's directive and intent in the HCA and to prevent an unreviewed transfer of interest along the lines that the Receiver has purported to effectuate. In any event, the Receiver plainly should not be able to use the injunctive provision in the Order as a "sword" to avoid the necessary and statutorily-required regulatory approvals or prevent other parties from seeking determinations relative to the HCA and CEC decisions.

II. PROCEDURAL BACKGROUND.

The Permanent Receivership Order (hereinafter, the "Order") provides as follows:

> That the commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, or any other proceeding, in law, or in equity or under any statute, or otherwise, *against the Respondent or any of its assets or property*, in any Court, agency, tribunal, or elsewhere, or before any arbitrator, or otherwise by any creditor, corporation, partnership or any other entity or person, or the levy of any attachment, execution or other process upon or against any asset or property of the Respondent, or the taking or attempting to take into possession any asset or property in the possession *of the Respondent* or of *which the Respondent has the right to possession*,

> or the cancellation at any time during the Receivership proceeding herein of any insurance policy, lease or other contract with the Respondent, by any of such parties as aforesaid, other than the Receiver designated as aforesaid, without obtaining prior approval thereof from this Honorable Court, in which connection said Receiver shall be entitled to prior notice and an opportunity to be heard, are hereby restrained and enjoined until further Order of this Court.

(Emphasis added).

Additionally, the Court approved the engagement of a special counsel ("Special Counsel") to investigate and assert any claims that the Plan had or may have. The Special Counsel issued numerous subpoenas to a plethora of individuals and entities, and filed an action against numerous entities, including Prospect, in the United States District Court for the District of Rhode Island ("Federal Action").

The Proposed Settlement Agreement

The Receiver filed a Petition for Settlement Instructions ("Settlement Petition") in the Receivership Action, requesting that the Court "approv[e] the Proposed Settlement as in the best interests of the Receivership Estate, the Plan, and the Plan participants" and "authoriz[e] and direct[] the Receiver to proceed with the Proposed Settlement." The Proposed Settlement attached the form of "Settlement Agreement" is by and between the Receiver, other class action plaintiffs in the Federal Action, CharterCARE Community Board, St. Joseph, and Roger Williams.

Under the proposed Settlement Agreement, CharterCARE Community Board will hold its 15% interest in Prospect "in trust for the Receiver," and the Receiver "will have the full beneficial interest therein." *See* Settlement Agreement ¶ 17.

The Petition for Declaratory Order

On September 27, 2018, Prospect filed the Petitions with the RIAG and RIDOH pursuant to R.I. Gen. Laws §42-35-8, seeking a determination of the preclusive effect of the HCA and CEC

decisions, as well as the determination that the transfer of interest in the proposed Settlement Agreement is violative of the HCA, as it is defined as a "conversion," thereunder.

Hearing on Settlement Petition

The Court scheduled and held a hearing on the Settlement Petition on October 10, 2018, at which the Prospect Entities argued that the Settlement Agreement was not in the best interest of the Receivership Estate because it would subject the Receivership Estate to numerous lawsuits by third-parties affected by the Settlement Agreement. The Court reserved decision, indicating that a written decision would issue.

Motion for Contempt

On October 5, 2018, the Receiver filed the instant Motion for Contempt, arguing that Prospect committed a contemptuous act by filing the Petitions, because the Petitions constitute a "proceeding" before an "agency," which the Order allegedly prohibits. *See* Receiver's Mot. for Contempt at 14. In support of such argument, the Receiver asserts that Prospect willfully disobeyed the Order by filing the Petitions.

III. STANDARD OF REVIEW.

"The authority to find a party in civil contempt is among the inherent powers of our courts." *Now Courier, LLC v. Better Carrier Corp.*, 965 A.2d 429, 434 (R.I. 2009) (citing *Gardiner v. Gardiner*, 821 A.2d 229, 232 (R.I. 2003)). The purpose of civil contempt is to "coerce the contemnor into compliance with the court order and to compensate the complaining party for losses sustained." *Id.* (quoting *Biron v. Falardeau*, 798 A.2d 379, 382 (R.I. 2002)). A finding of civil contempt is reserved to the sound discretion of the trial justice and depends on the circumstances of each case. *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 464 (R.I. 2008) (citing *Durfee v. Ocean State Steel, Inc.*, 636 A.2d 698, 704 (R.I. 1994)). Although not formally

adopted by our Supreme Court, the Superior Court has held that four factors must be fulfilled in order for a contempt motion to be granted: "(1) that the alleged contemnor had notice that he was within the order's ambit, (2) that the order was clear and unambiguous, (3) that the alleged contemnor had the ability to comply, and (4) that the order was indeed violated." *Kushner v. Suffolk Realty*, LLC, 2013 R.I. Super. LEXIS 193, *6-7 (R.I. Super. Ct. 2013) (quoting *U.S. v. Saccoccia*, 433 F.3d 19, 27 (1st Cir. 2005); *see also In re Court Order Dated October 22, 2003*, 886 A.2d 342, 349 (R.I. 2005) ("to be enforceable by contempt proceedings, an order should be clear and certain in its terms and should be sufficient to enable one reading it to learn therefrom what he may or may not do"). It is the movant's burden to demonstrate such showing by clear and convincing evidence. *Lead Industries, Ass'n, Inc.*, 951 A.2d at 464.

IV. ARGUMENT

A. The Petitions Are Not Actions "Against" Any Assets or Property of the Receivership Estate.

The Order prohibits actions against the Receivership Estate or any of its property or assets. However, the Petitions, filed under Section 8 of the Rhode Island Administrative Procedures Act ("APA"), are not against the Receivership Estate or any of its property or assets. Rather, the Petitions are administrative declaratory actions to determine the Acquiror's legal rights and status as a result of final HCA and CEC decisions. Specifically, Section 8 of the APA allows a Petitioner to request a determination as to the applicability of a statute or an agency order specifically to that Petitioner. Furthermore, the Receiver mischaracterizes the Petitions. The Petitions do not seek to invalidate the Settlement Agreement; they ask for a determination as to the preclusive effect of the final HCA and CEC decisions, and whether the transfer being proposed or purportedly undertaken by the Receiver under the Settlement Agreement is a "conversion." Prospect, as set forth below, cannot secure any affirmative relief from the Petitions, but Prospect might well be given some

direction on certain, critical issues resulting from an extensive and very expensive process that is relied upon to a great extent to preserve distressed community hospitals – a process relied upon by this Court. **The current regulatory petitions seek to determine whether the proposed transfer should be considered a "conversion"; if so, the outcome would be that the Receiver would have to petition the regulatory agencies to accomplish his settlement, nothing more.** Accordingly, even if we were to accept the Receiver's misguided view on the scope of assets and interests that are protected by the Receivership Order, the current petitions do not directly implicate any asset or property of the Receivership Estate. However, the Court should be mindful that the last time that a conversion was undertaken without regulatory approval, there was a fine of $1M levied against the participants as pursuant to Consent Order dated October 30, 2017.

Section 42-35-8 of the APA is an administrative counterpart of the Rhode Island Uniform Declaratory Judgments Act. *See Liguori v. Aetna Casualty & Sur. Co.,* 119 R.I. 875, 882 (1978). This Court has previously noted that the unique character of a declaratory judgment proceeding as one that "is neither an action at law nor a suit in equity but a novel statutory proceeding." *Bouchard v. Cent. Coventry Fire Dist.,* 2017 Super. LEXIS 68, at *6 (R.I. Super. Ct. April 14, 2017) (citing *Newport Amusement Co. v. Maher*, 92 R.I. 51, 53 (1960)). The purpose and intention of a declaratory judgment proceeding is to "facilitate the termination of controversies." *Id.* The Rhode Island Supreme Court has noted that "the purpose of the [UDJA] is to protect parties, resolve controversies, and afford relief from uncertainty and insecurities with regard to rights, status and other legal relations." *Haveiland v. Simmons*, 45 A.3d 1246, 1257 (R.I. 2012). Utilizing the automatic stay in the bankruptcy context as an analogy, the automatic stay does not operate to prevent certain actions for declaratory relief. *See, e.g., In re James Hunter Machines Co.*, 31 B.R. 528, 530 n.5 (Bankr. D. Mass. 1983).

In fact, as the Rhode Island Supreme Court held in *Liguori v. Aetna Casualty & Sur. Co.*, that an administrative agency, when petitioned to render a determination under R.I. Gen. Laws § 42-35-8, cannot order any affirmative relief as an adjunct of its authority to issue a declaratory order. *See* 119 R.I. 875, 882 (R.I. 1978) (citing *Sousa v. Langlois*, 97 R.I. 196 (1964)). Therefore, it is clear that the Petitions were not actions against any assets or property of the Receivership Estate. Rather, the Petitions represent a necessary vehicle to exhaust administrative remedies available to Prospect in this particular setting and, as set forth below, the filing of the Petitions is a step that the Receiver should have taken on his own, had he been mindful of the regulatory structure that is involved. *See Greenwich Bay Yacht Basin Assocs. v. Brown*, 537 A.2d 988, 992-93 (R.I. 1988) ("one may not seek judicial relief when one has not exhausted administrative remedies given by statute").

B. CharterCARE Community Board's Interest in Prospect Is Not an Asset or Property of the Receivership Estate

A third-party, membership interest in Prospect is not an asset or property of the Receivership Estate. In the receivership context, the Court has found that an order appointing a receiver was clear and unambiguous when it enjoined the "taking or attempting to take into possession any property in the possession of [the Receivership Estate] or of which [the Receivership Estate] has the right to possession." *Levinger v. Providence Watch Hosp., LLC*, 2010 R.I. Super. LEXIS 125, at *14-15 (R.I. Super. Aug. 13, 2010). Specifically, in *Levinger*, the defendants—two employees of the debtor company—violated such provision when they "systematically focus[ed]" on certain manufacturers and customers of the debtor company and "attempt[ed] to replace, in effect cancel, [the debtor company's] accounts, contracts, and purchase orders." *Id.* However, in *Levinger*, the assets transferred, or purportedly interfered with, were not the property of a third-party or contingently part of the Receivership Estate, but unequivocally and

undoubtedly assets of the Receivership Estate *at the time the order was entered. See Levinger*, 2010 R.I. Super. LEXIS 125, at *14-15 (accounts payable, distribution contracts, purchase orders).

There is nothing in the Record that would provide that CharterCARE Community Board's 15% interest in Prospect is an asset or property of the Receivership Estate. The Receiver argues that the proposed Settlement Agreement somehow makes CharterCARE Community Board's 15% interest in Prospect an asset of the Receivership Estate. Under this logic, the Receiver asserts the tenuous claim that CharterCARE Community Board's interest in Prospect that is transferred under the Settlement Agreement is an "asset" of the Receivership Estate by virtue of a Settlement Agreement that is subject to and contingent upon Court approval – which has not yet been given. Additionally, the Receiver asserts that the Settlement Agreement itself constitutes an "asset" as it is a "presently binding contract that presently provides rights and interests . . . to the Receiver." However, such contention does not comport with the law, as a conditional contract—such as the Settlement Agreement—does not become binding until the condition precedent contemplated therein occurs. *Allen v. Marciano*, 84 A.2d 425, 428 (R.I. 1951) ("The making and delivering of a writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent to its becoming obligatory. In such case it does not become operative as a contract until the performance or happening of the conditions precedent").[5]

C. Furthermore, the Proposed Settlement Agreement does not Convert CharteCARE Community Board's Interest in Prospect into an Asset or Property of the Receivership Estate.

It is clear that CharterCARE Community Board's 15% interest in Prospect is not an asset or property of the Receivership Estate. Furthermore, the proposed Settlement Agreement does not convert that interest or insulate the proposed transfer from regulatory review. In the Motion for

[5] *See* discussion *infra*.

Contempt, the Receiver argues that the Settlement Agreement is a "presently binding contract that presently provides rights and interests . . . to the Receiver." Motion at 15, n.4. However, the Receiver has also asserted that third parties affected by the Settlement Agreement have no standing to object to it because the Settlement Agreement is not effective until Court approval. Specifically, the Receiver has argued that "[t]he Federal Court must approve the Proposed Settlement for its substantive terms to go into effect," and "Objectors can suffer no injury-in-fact from the Proposed Settlement unless and until (at the earliest) the Federal Court approves it, and, until then, their injuries are purely "conjectural" and "hypothetical" rather than "concrete and particularized" ("Standing Arguments"). Receiver's Reply to Obj. to the Receiver's Petition for Settlement Instructions at 14. Apparently, on one hand, the Receiver argues that the Settlement Agreement is binding, and on the other, argues that it is not binding until Court approval. He simply can't have it both ways.

The Receiver's argument that the Settlement Agreement is binding is not consistent with law. The Receiver drafted the Settlement Agreement to have the Court's denial of the Settlement Agreement act as a condition subsequent, causing the Settlement Agreement to become null and void. This is extremely transparent. The practical effect of the settlement structure contemplated by the Settlement Agreement, and consistent with the Receiver's Standing Arguments, is that Court approval is required *prior* to the Settlement Agreement becoming binding. As a practical matter, the sleight of hand should be ignored. Court approval is a condition *precedent* to the Settlement Agreement, and thus the Settlement Agreement cannot be deemed binding until such approval—or condition precedent—was obtained. *See Allen*, 84 A.2d at 428.

The conclusion that Court approval is a condition precedent to a settlement agreement's binding effect is reasonable and consistent with receivership practice. To hold otherwise would

be to hold that a receiver may enter into a settlement contract, and that contract be binding, before the Court – from which the Receiver ultimately takes instruction and on whose behalf the Receiver functions – can consider or approve its terms. Therefore, actions could be taken to carry out the settlement agreement even though the Court had not yet approved the settlement, and if the Court reviews the agreement and rejects it, such actions would have to be unwound. The unwinding of such premature actions would constitute a waste of judicial resources and the receivership's assets. As explained by Ralph E. Clark,

> [t]hose who deal with an office of the court with limited powers must be presumed to know that the receiver can make no contract which will effectually bind the assets in the hands of the receiver unless such contract is first authorized by the court or subsequently ratified or sanctioned by the court. It therefore follows that the receiver takes a great risk in entering into a contract not specifically authorized or thought to be authorized by a general order not broad enough to include such a contract. Furthermore, those dealing with a receiver and on their part entering to such an unauthorized contract take great risks.

Ralph Ewing Clark, LLD, A Treatise on the Law and Practice of Receivers, § 358(a), 617 (3rd ed. 1992) (emphasis added).[6]

Here, the Receiver himself has asserted, where convenient, that the Settlement Agreement is presently nothing more than a conditional right, contingent upon approved by this Court and the United States District Court for the District of Rhode Island. Accordingly, pursuant to his own arguments, because Court approval must be obtained *before* the Settlement Agreement is effective, Court approval is a condition precedent, without which the Settlement Agreement cannot be

[6] The Receiver will likely argue that the authority to "compromise claims" in the Order permits him to enter into the Settlement Agreement. However, such argument is belied by the fact that the Receiver did not first petition the Court for instructions to enter into settlement discussions, which is a prerequisite when the proposed settlement affects the rights of third-parties. *See* Clark, *supra* § 102, at 154 ("A receiver is authorized to appear before the court at any time and ask for instructions . . . action by the court affecting the rights of the parties to the suit or other parties should be in writing and placed on the court's records, and before such orders are make, parties adversely interested should have a right to appear and be heard").

binding. Therefore, the Settlement Agreement—or any interest that it transfers, such as CharterCARE Community Board's interest in Prospect—is not an "asset" or "property" of the Receivership Estate because it is not binding.

Even if the Court puts aside the Receiver's concessions, the plain language of the Settlement Agreement's conditional nature is evidenced not only by the fact that the Settlement Agreement will become "null and void" if it is not approved by the Court, *see* ¶¶ 2, 35, but also by the fact that the contemplated transfer of CharterCARE Community Board's interest in Prospect—and all other transfers contemplated in the Settlement Agreement—to the Receiver is required to occur *after* Court approval, *see* ¶ 17-19.

Because the Settlement Agreement is conditioned upon Court approval, which has yet to be obtained, the Settlement Agreement and the transfers contemplated therein are not binding and thus not "property" or an "asset" of the Receivership Estate. As the Settlement Agreement or CharterCARE Community Board's interest in Prospect is not property of the Receivership Estate, the filing of the Petition does not affect any "asset" or "property" of the Receivership Estate; therefore, Prospect took no contemptuous actions and the Motion for Contempt should be denied.

D. <u>On this Record, a Cause of Action Against Prospect for Pension Plan Liability Is Not an Asset of the Receivership Estate.</u>

Because of the involvement of RIAG and RIDOH in the review and approval of the conversion under the HCA by which Prospect acquired the Hospitals and not the Pension Plan liability, the determination that Prospect seeks in the Petitions is necessary to determine whether a cause of action alleging Pension Plan liability against Prospect (or Prospect Medical Holdings or Prospect East, etc.) is actually an asset of the Receivership Estate. While the Receiver simply wants to ignore the regulatory involvement and have everything handled in Court proceedings, he fails to understand the effect of the prior regulatory proceedings and their implications in deciding

what can actually be litigated in Court proceedings. Likewise, the regulatory review is a necessary vehicle to determine whether an interest purportedly being transferred to the Receiver in violation of the HCA is an asset of the Receivership Estate.

As a threshold matter, legal or equitable interests of the Receivership Estate are generally determined in bankruptcy Court (as an analogy) by reference to state law. *See Butner v. United States*, 440 U.S. 48, 54 (1979). Thus, it would make sense to exhaust the Acquiror's administrative remedies and have the appropriate administrative agencies determine the preclusive effect of the prior and final HCA and CEC decision and thus whether a cause of action alleging that the Acquiror has pension plan liability is an asset of the Receivership Estate. Furthermore, the administrative agencies are most appropriate to decide whether the Receiver, without authority of this Court, has undertaken a transfer of interest in violation of the HCA.

E. <u>The Receiver Stands in the Shoes of St. Joseph – St. Joseph Advocated for and is Bound by Decision Approving a Transaction in which Prospect Assumed No Pension Plan Liability.</u>

The Petitioner in this matter, St. Joseph, alleged in the Petition addressed to this Court under Rule 11 that the Acquiror, including Prospect, "had no role in the evaluation of the [pension] plan or its funding level" during the HCA and CEC proceedings or thereafter and, the Acquiror did not "assume [ ] the [pension] plan or any liability with respect thereto is clearly set forth in the Asset Purchase Agreement amongst the parties." *See* Receivership Petition at ¶ 4. This is a judicial admission by the entity being petitioned into receivership and the Receiver has no higher rights than that which said entity had at the time this matter was petitioned into receivership.[7] It is a bedrock principal of receivership that a receiver stands in no better shoes than the debtor

[7] "A judicial admission is deliberate, clear, unequivocal statement of a party about a concrete fact within that party's knowledge [,]" which is "considered conclusive and binding as to the party making [it]." *See State v. Rice*, 986 A.2d 247, 249 (R.I. 2010).

company and has no higher rights than that which the company has, pre-petition. *See Marandola v. Marandola Mec., Inc.*, 2005 R.I. Super. LEXIS 94, at *8 (R.I. Super. Ct. 2005); *see also Vitterito v. Sportsman's Lodge & Restaurant, Inc.*, 102 R.I. 72, 80 (1967) (generally, a receiver succeeds only to the debtor's rights and takes the debtor's property subject claims, liens and equities which would affect the debtor if he himself were asserting his interest in the property). Therefore, the Court must often examine how a matter would proceed if the entity "**were not in receivership.**" *See Marandola*, 2005 R.I. Super. LEXIS 94, at *8 (emphasis supplied). In this instance, prior to Receivership, the Acquiree, including St. Joseph, bound themselves by contract that the Acquiror would not be acquiring the Pension Plan or assuming any liability related thereto. Moreover, that contractual commitment was reviewed and approved pursuant to a full HCA and CEC process which is quasi-judicial in nature and, thus, review of that determination is barred *res judicata*. *See Town of Richmond v. Wawaloam Reservation, Inc.*, 850 A.2d 924, 933-934 (R.I. 2004).[8] Accordingly, when the Receiver came into this proceeding standing in the shoes of the Receivership Estate, the Receiver was bound to investigate and explore whether it was precluded from alleging that the Acquiror, including Prospect, had any Pension Plan liability. The Receiver should be barred from making any such allegations. At a minimum, the Receiver was bound to seek relief or a determination by the administrative agencies of his rights and interests, which he did not do. *See Greenwich Bay Yacht Basin Assocs. v. Brown*, 537 A.2d 988 (R.I. 1988). Thus, for example, in *Greenwich Bay Yacht Basin Assocs.*, the Rhode Island Supreme Court directed a

[8] Prospect will not address the substance of the Petitions in this forum. It is not fair to the Court. The Court cannot address the substantive aspects of those Petitions as that would equate to summary proceeding which would not be allowed in this instance. *See Marandola, Inc.*, 2005 R.I. Super. LEXIS 94, at *8. Suffice to say, however, that the RIAG committed its entire Objection to the Petition for Settlement Instructions to clearly taking the position that the proposed transaction by the Receiver is violative of the prior conversion. However, in Reply to Prospect's Objection, the RIAG focused simply on whether the Administrative Procedures Act applies to the RIAG and discussed the doctrine of administrative finality. For whatever reason, RIAG ignored the doctrine of administrative *res judicata* in its discussion. In any event, RIAG and RIDOH will eventually rule on the petitions and there are then, appellate rights.

remedy that the parties had to pursue petitions for declaratory order pursuant to R.I. Gen. Laws § 42-35-8, in order to appropriately exhaust administrative remedies.

Here, the Receiver has gone full speed ahead and filed causes actions and allegedly undertaken transfers of interest all violative of the prior HCA and CEC decisions. The Receivership Estate, pre-Receivership, would never had been able to undertake those steps. The establishment of the Receivership Estate does not give the Receiver the power or authority to bypass the required regulatory process. The Receiver, at a minimum, should have exhausted its administrative remedies and sought relief or a declaration from the agencies best suited to speak to this issue. *See Pawtucket Power Assocs. Ltd. Partnership v. Pawtucket*, 622 A.2d 452 (R.I. 1993).

The Receiver did not do so, and now seeks to hold Prospect in contempt for bringing these regulatory agencies into the process of considering the implications of the Receiver's actions. The Receiver should not be allowed to use the injunctive provision of the Receivership Order as a "sword" to prevent that regulatory process from proceeding. Prospect has every right to seek a declaration from the relevant administrative agency – indeed, the Receiver should be ordered by this Court to participate in that process.

Furthermore, it was important to request such a declaration prior to the settlement agreement being approved, because if the settlement agreement is approved, then the Acquiror may practicably lose certain rights under the administrative framework. For example, the Receiver cites *Waller v. Fin. Corp. of Am.,* 828 F.2d 579, 583 (9th Cir. 1987) in his Reply to the Objections to his Petition for Settlement Instructions for the proposition that "[a] non-settling defendant has standing to object to a partial settlement which purports to strip it of a legal claim or cause of action, an action for indemnity or contribution for example." *See* Receiver's Reply at 14. In this

instance, allowing a transaction that is violative of the prior and final HCA and CEC decision, and is built upon a premise that the Acquiror has pension plan liability even in light of such decision, threatens to strip Prospect of legal claims.

F. The Receiver Is Equitably Estopped from Relying on the Injunctive Provision of the Permanent Receivership Order.

Furthermore, the Order allows the Receiver to institute actions in the administration of the Receivership Estate. The Receiver has chosen to file actions in the administration of the Receivership Estate, which allege Pension Plan liability on behalf of the Acquiror. As both attorneys, Steve Sheehan and Max Wistow stated in oral argument on October 10, 2018, all of the issues that Prospect has raised in the Petitions will be litigated in those cases. Furthermore, as Prospect Medical argued, the Receiver has gone one step further in the administration of the Receivership Estate and has allegedly effectuated a transfer that Prospect alleges is in violation of the governing transactional documents that were reviewed, approved and adopted by reference in the final HCA and CEC decisions. The Receiver has actually gone forward and filed UCCs with regard to that transfer.

In this case, the Court is acting as a court of equity; there is no statutory vehicle for this proceeding. The Court's authority is based on the Court's inherent equitable authority. From an equitable standpoint, a Court must estop the Receiver from using the injunctive provision as a "sword" against a party-in-interest once the Receiver has initiated such an action in the alleged administration of the Receivership Estate. In essence, even if the injunctive provisions of the Permanent Receivership Order applied, *arguendo*, the Receiver has waived any of the injunctive protections with regard to the issues that the Receiver has put into play in the litigation. As explained in *In re Mid-City Parking, Inc.*, 332 B.R. 798, 820 (Bankr. N.D. Ill. 2005),.

> It goes without saying that once a trustee or debtor-in-possession unilaterally waives the protections of the automatic stay by proceeding with estate administration, he cannot contend that a creditor-appellee has violated the automatic stay by opposing the appeal he himself has initiated and prosecuted. If the trustee has waived the protections of the stay, it would logically no longer exist to restrain the creditor-appellee. Also, from an equitable standpoint, one court has held that the debtor-in-possession is estopped from asserting the stay against a creditor-appellee once it has initiated an appeal in the face of §362(a).

Furthermore, in this instance the Receiver has not only taken the affirmative step of instituting litigation, the Receiver has also alleged to have unilaterally undertaken an actual transfer of interest.

V. CONCLUSION

For those reasons, the Motion to Adjudge in Contempt should be denied. In addition, the Receiver should be instructed to participate in the regulatory determination of the Petitions before the RIAG and RIDOH.

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Dated: October 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2018, the within document was electronically filed through the Rhode Island Superior Court Case Management System by means of the EFS and is available for downloading by all counsel of record.

/s/ W. Mark Russo