Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
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Reviewer: Brittany A.

STATE OF RHODE ISLAND PROVIDENCE, SC.		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	:	**Hearing: March. 14, 2019 @ 9:30 a.m.**

THE RECEIVER'S MEMORANDUM OF LAW IN SUPPORT OF HIS OBJECTION TO PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., AND PROSPECT CHARTERCARE, LLC'S *NOTICE OF INTENT TO SUE CHARTERCARE COMMUNITY BOARD OR IN THE ALTERNATIVE MOTION FOR RELIEF FROM THE INJUNCTIVE PROVISIONS OF THE PERMANENT RECEIVERSHIP ORDER*

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INTRODUCTION

The Receiver, Stephen F. Del Sesto, Esq. (the "Receiver") of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), submits this memorandum in support of his objection to the "Notice of Intent to Sue CharterCARE Community Board" ("CCCB") filed by Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and Prospect CharterCare, LLC (collectively "Prospect").

Prospect repeatedly indicates that it will bring one or more lawsuits against CCCB regardless of the outcome of this motion. Prospect also insists it will bring suit against CCCB in Delaware, notwithstanding that Delaware has no connection to the dispute other than as Prospect Medical Holdings, Inc. and Prospect East Holdings, Inc.'s state of incorporation. Prospect CharterCare, LLC is a Rhode Island limited liability company governed by Rhode Island law. CCCB is a Rhode Island nonprofit corporation. Nobody, with perhaps the exception of Prospect's attorneys, is located in Delaware. Although Prospect does not acknowledge the fact in its motion papers, the Delaware courts would be called upon to apply the law of Rhode Island to such dispute involving highly regulated issues surrounding the ownership and conversion of Rhode Island hospitals.

Perhaps nothing better demonstrates how baseless Prospect's motion is, and why it should be denied, than the fact that Prospect repeatedly asserts therein that the Receiver and the Receivership estate will be unaffected by any such lawsuit. Prospect anticipates the obvious conclusion that the Order Appointing Permanent Receiver should not be modified to allow Prospect to bring suit in Delaware if doing so would

impair the Receivership. To avoid that conclusion, Prospect incorrectly—and repeatedly—pretends the Receivership will not be impaired by Prospect's conduct.

Prospect's motion should be denied.

PROSPECT'S "FACTS"

In its instant Memorandum, Prospect rehashes portions of the "Factual Background" section of its Memorandum of Law filed in support of its motion to dismiss the First Amended Complaint in the Federal Action. Many of Prospect's assertions are incorrect, incomplete, or irrelevant. The Receiver declines to be drawn into an extended process of briefing and re-briefing of the same factual issues.

Nevertheless certain observations should be made.

First, Prospect contends that CCCB is liable to Prospect under the Asset Purchase Agreement and in breach of the LLC Agreement, but Prospect does not provide either document to the Court.

To find the Asset Purchase Agreement, Prospect asks the Court to visit the Attorney General's website, download, and sift through a third of a gigabyte of materials submitted in connection with the 2014 Hospital Conversions Act review until the Court finds the Asset Purchase Agreement. See Prospect's Memo. at 3 n.4. Prospect does not even inform the Court that there is a separate First Amendment to Asset Purchase Agreement that contains some of the operative definitions mis-cited in Prospect's motion papers.[1]

[1] For example, Prospect asserts that the Asset Purchase Agreement defines who the "Sellers" were. The operative definition of that term actually appears in the First Amendment to Asset Purchase Agreement.

As for finding the operative LLC Agreement, Prospect offers the Court no guidance whatsoever. It is not a publicly available document. It also contains provisions, which Prospect does not quote, permitting the very transfers from CCCB to the Receiver that Prospect attacks.[2]

Second, Prospect refers to and characterizes the Petition for Declaratory Order which it filed with the Rhode Island Department of Health. See Prospect's Memo. at 7. Notwithstanding that Prospect asks the Court to permit Prospect to refile that Petition with the Department of Health, Prospect has never provided a copy of it to the Court.

Third, Prospect claims it is entitled to indemnity from CCCB for liabilities arising out of the Pension Plan, including ERISA penalties. See Prospect's Memo. at 4. Prospect does not inform the Court, however, that in its opposition to the first settlement with CCCB filed with the federal court, Prospect has taken the position that ERISA "invalidates many forms of fiduciary indemnification and exculpatory arrangements". Prospect's Joint Memorandum in Opposition to Joint Motion For Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval of St. Joseph Health Services of Rhode Island, Roger Williams Hospital, and Chartercare Community Board, 18-cv-00328 (D.R.I.) (Dkt. 75-1, filed December 24, 2018) at 4. While Prospect also contends it is not an ERISA fiduciary, Prospect does not attempt to reconcile its claim of entitlement to indemnification with its acknowledgement that ERISA precludes many types of such indemnification.

[2] Prospect offers only the barest acknowledgement of the existence of these other provisions of the LLC Agreement. See Prospect's Memo. at 20 ("Moreover, the Receiver has argued that the transfer meets the requirements of the LLC Agreement because it is to an "affiliate," which Prospect East disputes. However, even if one were to put that issue aside, ...").

Fourth, Prospect contends that the Court in its decision[3] of November 14, 2018, in which the Court ruled that Prospect violated the Order Appointing Permanent Receiver but reserved decision on whether to hold Prospect in contempt, somehow "indicat[ed] that Prospect Chartercare should thereafter seek leave of Court to re-file the Petition after notice and hearing." Prospect's Memo. at 8. The Court in no way directed Prospect to file this motion but, rather, faulted Prospect for having previously initiated proceedings attacking Receivership property without having first obtained permission. See id., 2018 WL 6074195, at *5 ("Framed under the appropriate test, it becomes clear that the Petitions significantly impact the Plan's assets such that—prior to filing the Petitions—PCC should have sought this Court's relief.").

Fifth, Prospect discusses the Petitions for Declaratory Order without mentioning that the Attorney General has already indicated to the Court that such petitions are meritless. See *infra* at 21-24.

ARGUMENT

I. Prospect's failure to present the Court with a proposed Delaware complaint makes it impossible for the Receiver (much less the Court) to fully evaluate Prospect's request

One of the unacceptable anomalies of Prospect's "Notice of Intent" *sub judice* is Prospect's failure to attach any sort of proposed pleading to its papers. Prospect instead offers only characterizations—often implausible ones—of the lawsuits that Prospect says it will file in Delaware or with state agencies.

[3] St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC20173856, 2018 WL 6074195 (R.I. Super. Nov. 14, 2018).

The Receiver has been unable to locate any decisions even considering allowing relief from a receivership stay without the movant having provided the court and the receiver with the complaint that the movant proposes to file if such relief is granted. Litigants who seek judicial authorization to bring lawsuits file proposed pleadings. See, e.g., S.E.C. v. Stinson, No. CIV.A. 10-3130, 2012 WL 1994770, at *1 (E.D. Pa. June 4, 2012) (denying relief from stay to file proposed complaint attached as exhibit to motion); Fed. Trade Comm'n v. Loss Mitigation Servs. Inc., No. SACV090800DOCANX, 2009 WL 10673186, at *4 (C.D. Cal. Dec. 7, 2009) (denying leave to file the "proposed complaint submitted by" movant as an exhibit). Such litigants do not ask courts to modify their orders on the basis of vague descriptions of putative claims or hypotheticals.

In the absence of a proposed pleading, it is impossible for the Receiver (much less the Court) to properly evaluate Prospect's request. While Prospect's request should be denied on other grounds discussed *infra*, Prospect's failure even to submit a proposed pleading is an independently sufficient basis for denial.

II. Prospect's proposed claims against CCCB absolutely do fall within the Order Appointing Permanent Receiver

A. The Order *does* enjoin lawsuits seeking to impede the Receiver's duties and seeking to destroy rights belonging to the Receiver

In its November 14, 2018 decision concerning the first proposed settlement, the Court rejected Prospect's argument that CCCB's hospital interests (which it is holding in trust for the Receiver) are not encompassed by the litigation stay of the Order Appointing Permanent Receiver:

> Turning specifically to the matter at hand, PCC argues the Hospital Interest is not an asset of the Plan's estate because the PSA is "subject to and contingent upon Court approval—which has not yet been given." Pursuant to Bankruptcy Code precedent, the fact that the right to an asset depends upon a contingency does not prevent that asset from becoming a part of a debtor's estate. . . . It is of no legal consequence that court discretion, a matter completely outside the Plan's control, is the contingency restraining the Hospital Interest from fully materializing. . . . Therefore, the Receiver's rights to the Hospital Interest are a part of the Plan's estate, despite these rights being contingent and ultimately dependent upon court approval.

St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC20173856, 2018 WL 6074195, at *4 (R.I. Super. Nov. 14, 2018). Prospect's attempt to characterize the proposed Lawsuits as solely a dispute between Prospect and CCCB merely restates an argument the Court has already rejected. See id. at *5 ("It makes no difference that the Plan is not a named party to the Petitions . . . . Framed under the appropriate test, it becomes clear that the Petitions significantly impact the Plan's assets. . . .").

Prospect incorrectly contends that, "[f]or purposes of the proposed Lawsuits, CCCB's affiliation with the Receiver solely arises out of it holding its interest in Prospect Chartercare in trust for the Receiver." Prospect's Memo. at 10. While CCCB is presently holding its interests in Prospect Chartercare in trust for the Receiver, that is only one aspect of the Settlement Agreement among the Receiver, CCCB, and others that Prospect seeks to upend.[4]

Prospect insists: "simply because CCCB holds an interest in trust for the Receiver does not make CCCB part of the receivership estate." Prospect's Memo. at

[4] For example, Prospect also objects to CCCB's filing of a UCC-1 financing statement, to CCCB's admission of liability and acknowledgment of Plaintiffs' damages, and to CCCB's agreement to exercise the put option under the LLC Agreement upon Receiver's request.

10. While CCCB itself is not part of the receivership estate, the contractual rights of the Receiver running from CCCB are absolutely part of the receivership estate.

Prospect (inaccurately[5]) cites Dulgarian v. Sherman, No. C.A. NO. 91-3468, 1992 WL 813512 (R.I. Super. Jan. 7, 1992) for the proposition that a creditor may foreclose a second mortgage on a property notwithstanding that the holder of the first mortgage was in receivership, inasmuch as the rights of a first mortgage holder are unaffected by the foreclosure of a second mortgage. That holding is both unsurprising and completely inapposite to the instant case, where Prospect is very much attempting to affect—indeed invalidate—the rights of the Receiver.

Prospect contends that prior to CCCB's entering into the Settlement Agreement with the Receiver, Prospect would have been free to bring its lawsuits against CCCB irrespective of the Order Appointing Permanent Receiver. Prospect's Memo. at 11. That proposition is chronologically incoherent, since one of the express purposes of the lawsuits Prospect seeks to bring is to invalidate certain provisions of the Settlement Agreement. In other words, but for the Settlement Agreement, Prospect would have no reason to sue CCCB. In any event, the Court need not determine the extent to which Prospect might have brought hypothetical lawsuits at a time when it did not bring them, when the relationships among the parties have changed. The implication from Prospect's argument—that the Settlement Agreement changes nothing—is simply ludicrous.

Prospect's contention that nothing it proposes to do will affect the Receiver is either false on its face (as the Receiver believes) or simply an argument for waste of

[5] Prospect provides an invalid citation to Dulgarian v. Sherman.

judicial resources. If the outcome of the Prospect lawsuits' adjudication of the validity of the Settlement Agreement will be in no way binding on the Receiver, then those lawsuits will be nothing more than a trial run for a later dispute between Prospect and the Receiver based upon the rights the Receiver is obtaining from CCCB pursuant to the Settlement Agreement. Moreover, Prospect's assurance (if it can be called that) that the Receiver's rights will be unaffected in Delaware cannot be simply accepted at face value; even if it (*arguendo*) could be true, the Receiver would need to engage Delaware counsel to monitor and potentially intervene in such Delaware litigation. Certainly Prospect cannot be relied upon to remind the Delaware courts that they lack jurisdiction over Prospect's own collateral attack on this receivership estate. See Harned v. Beacon Hill Real Estate Co, 80 A. 805, 807 (Del. Ch. 1911) ("When a court having jurisdiction of the parties and of the subject-matter appoints a receiver over the property, or fund in controversy, the validity of such appointment and the properiety [sic] of the order cannot be successfully challenged in a collateral suit or proceeding."); Lowder v. Rogers, 315 S.E.2d 519, 520 (N.C. App. 1984) ("The plaintiffs' complaint is in essence an attempt to have some court other than the receivership court declare that the seized property does not fall within the control of the receivership court. This is not permissible.") (dismissing complaint).

The cost associated with preparing local Delaware counsel would be extensive and at the expense of the Pension Plan. Indeed, because of the complexities, it would seem likely that Delaware counsel would have to be retained not only by CCCB but also by the Receiver. Merely acquainting such new counsel with the complexities of this case would be a needlessly expensive proposition, ultimately to the detriment of the

Plan participants. Furthermore the additional defense costs of CCCB's being involved in Delaware litigation would reduce assets it will have available to pay pensions. As this Court noted:

> The PSA obligates the Settling Defendants to remit the bulk of their assets in favor of the Plan's estate and, therefore, it appears every dollar the Settling Defendants spend in continuing to litigate is a dollar less available to the Plan for the ultimate benefit of the Plan's beneficiaries.

St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *13 (R.I. Super. Oct. 29, 2018).

Prospect contends there must be a remedy for the breaches of contract it alleges CCCB is committing by transferring its interests to the Receiver. Prospect does not explain, however, why the professed need for a remedy presupposes that such remedy be sought both (1) immediately and (2) in Delaware.

First, CCCB has already filed a lawsuit against Prospect in Rhode Island Superior Court.[6] Prospect's claims, to the extent they have any validity, can be asserted against CCCB in that suit as counterclaims in that forum, which is far more convenient to all parties[7]—not to mention more convenient and less burdensome to the Receiver and the individual Plan participants who are plaintiffs in the Federal Action, all of whom are likely indispensable parties to Prospect's claims against CCCB but against whom jurisdiction cannot be obtained in Delaware.

[6] CharterCARE Community Board v. Samuel Lee *et al.*, PC-2019-3654. Drafts of CCCB's Verified Complaint were previously e-mailed by CCCB's counsel to both Prospect's counsel and the Receiver's counsel on January 7, 2019 and March 1, 2019.

[7] All parties to Prospect's proposed Delaware suit, as described by Prospect in its instant motion, are parties to CCCB's pending lawsuit.

Second, even if there were no pending lawsuit between CCCB and Prospect, Prospect could seek to obtain permission from the Court to bring such suit in Rhode Island instead of Delaware.

Third, the same Settlement Agreement that Prospect attacks provides that CCCB will petition itself into judicial liquidation proceedings. Prospect will presumably be free to assert any claims against CCCB in that liquidation proceeding, alongside the claims of the Receiver in that liquidation proceeding.

Fourth, Prospect has had an opportunity, but has failed, to assert crossclaims against CCCB in the Receiver's pending federal lawsuit, i.e. the lawsuit in which the Receiver seeks to impose the very liabilities for which Prospect contends it is entitled to seek indemnity from CCCB.

Prospect also contends that because Prospect is a stranger to the Settlement Agreement between CCCB and the Receiver, the Receiver must be a stranger to the LLC Agreement. Prospect's Memo. at 13-14. That "principal [sic]," id. at 14, is incorrect. The Receiver owns a beneficial interest in CCCB's membership in Prospect Chartercare and a perfected security interest in CCCB's assets. Furthermore, as an incoming substituted member, the Receiver is more akin to an assignee or successor than to a legal stranger. See St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC20173856, 2018 WL 6074195, at *6 (R.I. Super. Nov. 14, 2018) ("[T]he PSA [Proposed Settlement Agreement] assigned to the Receiver contingent rights in the Hospital Interest, irrespective of whether the PSA's substantive terms are ultimately approved by court order.").

B. The Court does not exceed its equitable jurisdiction by leaving the Order Appointing Permanent Receiver undisturbed

Prospect contends that maintaining the litigation stay in place exceeds the Court's equitable jurisdiction. Prospect's Memo. at 14. The only purported basis Prospect musters for that argument is:

> Equitable jurisdiction of the Superior Court "is not limitless" and is predicated on a litigant being entitled to some form of equitable relief. *See Ret. Bd. of the* [sic] *Emplees*. [sic] *Ret. Sys. of Providence v. Corrente*, 111 A.3d 301, 306 (2015) ("[A] litigant must seek or be entitled to some form of recognized equitable relief in order to invoke this jurisdiction").

Prospect Memo. at 14-15. Prospect has plucked those three words ("is not limitless") entirely out of context, omitting both the prefatory phrase that the "Superior Court is a court of general equitably jurisdiction," and the rest of the sentence that "the Superior Court possesses, as a matter of fundamental judicial power, the jurisdiction to hear and confront the merits of any case wherein the power of determination has not been specifically conferred upon another tribunal":

> General Laws 1956 § 8–2–13 provides: "The superior court shall, except as otherwise provided by law, have exclusive original jurisdiction of suits and proceedings of an equitable character and of statutory proceedings following the course of equity * * *." **We have previously held that the Superior Court "is a court of general equitable jurisdiction * * *; although its jurisdiction is not limitless, the Superior Court possesses, as a matter of fundamental judicial power, the jurisdiction to hear and confront the merits of any case wherein the power of determination has not been specifically conferred upon another tribunal**." *La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights*, 419 A.2d 274, 279 (R.I.1980). While the Superior Court's jurisdiction over matters of equity is broad, a litigant must seek or be entitled to some form of recognized equitable relief in order to invoke this jurisdiction. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999); *Martin v. James B. Berry Sons' Co.*, 83 F.2d 857, 859 (1st Cir. 1936); see also John Norton Pomeroy, 1 Equity Jurisprudence § 62 at 82–83 (5th ed. 1941) ("a court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy the facts of

> which do not bring it within some general principle * * * of the equitable jurisprudence").

Ret. Bd. of Employees' Ret. Sys. of City of Providence v. Corrente, 111 A.3d 301, 306-07 (R.I. 2015) (emphasis supplied). The power to adjudicate Prospects' claims against CCCB has not been "specifically conferred upon another tribunal," i.e. one other than the Superior Court. Moreover, the Receiver is obviously acting pursuant to "some form of recognized equitable relief" since appointment of receivers has long been "considered one of the more important inherent powers of an equity court." Peck v. Jonathan Michael Builders, Inc., No. C.A. KM 06-0236, 2006 WL 3059981, at *5 (R.I. Super. Oct. 27, 2006), aff'd, 940 A.2d 640 (R.I. 2008). See also Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc., 929 F. Supp. 369, 373 (D. Colo. 1995) ("The power of a federal court to enter such [blanket litigation] stays does not depend on specific congressional authorization. Rather, this authority is based upon the inherent and broad equitable powers of federal courts to protect its jurisdiction over the property for which it has taken possession.").

Prospect baldly and incorrectly asserts: "The Receiver has no standing to seek equitable relief to prevent the Prospect Entities from pursuing their rights under the LLC Agreement." (Prospect's Memo. at 15.) Prospect provides no authority for that assertion, which is plainly inconsistent with the Court's prior rulings that CCCB's interests under the LLC Agreement, which it is holding in trust for the Receiver, are already part of the Receivership estate. See St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC20173856, 2018 WL 6074195, at *5 (R.I. Super. Nov. 14, 2018) ("The declarations

sought by PCC clearly jeopardize the Receiver's contingent rights in the Hospital Interest.").

Instead of discussing[8] the Court's November 14, 2018 decision dealing directly with Prospect's commencement of separate proceedings in violation of the Receivership Order, which squarely addresses the scope of the Order Appointing Permanent Receiver and its litigation stay, Prospect selectively quotes snippets of the Court's October 29, 2018 Decision *on the Petition for Settlement Instructions*. In particular, Prospect quotes portions of the October 29, 2018 Decision holding that Prospect lacked standing to assert its challenges in the context of that settlement petition, and offers them for the contention that Prospect must *now* be permitted to assert those challenges *in Delaware*. Essentially Prospect's argument is: (1) Prospect must be able to "pursue rights against CCCB somewhere; (2) Delaware is somewhere; *ergo* (3) Prospect must be able to sue CCCB in Delaware. This is simply a slight reformulation of the fallacy sometimes known as the "politician's syllogism."[9] There is a vast excluded middle between the prior settlement petition proceedings and Delaware. For example, other proceedings are available to Prospect in Rhode Island, especially now that CCCB has brought suit against Prospect in Providence Superior Court.

[8] Except, in passing, to characterize its holding incorrectly. See *supra* at 4.

[9] See, e.g., House of Commons Debates, Vol. 640, Col. 92 (April 30, 2018) ("We must be careful, however, not to commit the politician's syllogism from '*Yes, Minister*'. There is a problem. Something must be done. This is something, so let's do this.").

III. The Court should not grant Prospect relief from the Order Appointing Permanent Receiver

"An anti-litigation injunction is simply one of the tools available to courts to help further the goals of the receivership." Lawsky v. Condor Capital Corp, 154 F. Supp. 3d 9, 27 (S.D.N.Y. 2015). One of the purposes of a blanket receivership stay is to safeguard the Receiver against "being forced into court by every investor or claimant". S.E.C. v. Illarramendi, No. 3:11CV78 JBA, 2012 WL 234016, at *5 (D. Conn. Jan. 25, 2012). Accordingly, before lifting a stay, the court "should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate." Id. "Courts have not limited the use of bar orders to barring claims against receiverships only; courts have also used bar orders to bar claims against third parties settling with receiverships." Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd., No. 3:09-CV-0298-N, 2017 WL 9989249, at *2 (N.D. Tex. May 16, 2017) (equity receivership in which the court barred third parties from asserting claims against party who had settled with receiver). See also Lawsky v. Condor Capital Corp, 154 F. Supp. 3d 9, 27–28 (S.D.N.Y. 2015) ("Permitting further litigation would merely waste the receivership assets and potentially scuttle a deal that the Receiver believes to be the best available.").

Prospect proposes the Court apply the Wencke factors in determining whether to lift the litigation stay. See S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984) (identifying "three factors to consider in deciding whether to except applicants from a blanket stay: (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is

made; and (3) the merit of the moving party's underlying claim."). Assuming (*arguendo*) these are the correct factors to apply in the context of a Rhode Island receivership's litigation stay, their application favors maintaining the litigation stay in place, not lifting it.

A. The status quo should be maintained by leaving the stay in place

Under the first Wencke factor, courts determine "whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed." S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984). "This requires the Court to balance the Receiver's interest in maintaining the status quo with any injury the moving party may suffer if the stay remains in place." Schwartzman v. Rogue Int'l Talent Grp., Inc., No. CIV.A. 12-5255, 2013 WL 460218, at *2 (E.D. Pa. Feb. 7, 2013). In making this balancing determination, the court "should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate." United States v. Acorn Tech. Fund, L.P., 429 F.3d 438, 443 (3d Cir. 2005). This factor weighs in favor of maintaining the litigation stay.

Although Prospect does not attach any proposed pleading to its motion—an omission tending to obscure the nature and extent of the relief being requested, as discussed *supra* at 4-5—Prospect does refer to various disputes that it intends the Lawsuits to decide. These include:

- Whether the Settlement Agreement "violate[s] the LLC Agreement" (Prospect's Memo. at 13);[10]
- Whether the Receiver's "purposes" as a member in Prospect Chartercare are inconsistent[11] with Prospect Chartercare's "community healthcare mission" (Prospect's Memo. at 20);
- Whether the transfer "of beneficial rights to the Receiver violates Article 13 of the LLC Agreement" (Prospect's Memo. at 20); and
- Unspecified "other disputes" to which "[t]he litigation commenced by the Receiver and the Receiver's proposed settlement with CCCB [have] give[n] rise" that "must be resolved" (Prospect's Memo. at 17).

Prospect cannot seriously contend that these disputes can be resolved without adversely affecting the Receiver's interests, and Prospect does not even pretend that its interests outweigh those of the Receiver.

Prospect asserts in conclusory fashion that it is suffering an injury, Prospect Memo. at 17, but makes no showing whatsoever thereof. Moreover, with respect to whether continuation of the anti-litigation injunction is necessary to preserve of the status quo, Prospect turns this factor on its head by contending that the standard is whether the status quo would be preserved by permitting Prospect to file suit in Delaware! Not only is that not the test, it is also factually untrue that permitting Prospect

[10] See Prospect's Memo. at 13 ("[T]he Prospect Entities nevertheless had the right to challenge objectionable terms in another proceeding. That other proceeding is exactly what the Prospect Entities seek to initiate following this motion.").

[11] It is curious that Prospect believes it is entitled to run Prospect Chartercare as a profitmaking enterprise for the benefit of its members, but the Receiver should be disqualified from directing any of those profits towards the Pension Plan.

to bring suit in Delaware will preserve the status quo. Prospect's only basis for this contention is Prospect's repeated and incorrect insistence that the Receiver will be unaffected by those Delaware Lawsuits. See Prospect's Memo. at 12 ("In other words, no matter the outcome of the Prospect Entities claims against CCCB, the Receiver's interest in CCCB will remain."); id. at 17 ("In contrast, the status quo will be maintained because even if the Lawsuits proceed to judgment in favor of the Prospect Entities, the Receiver's interest in CCCB will remain unaffected."). This contention remains palpably absurd.

B. The timing of Prospect's motion weighs against lifting the stay

Under the second Wencke factor, courts consider "the time in the course of the receivership at which the motion for relief from the stay is made". S.E.C. v. Wencke, 742 F.2d at 1231. "There is no presumptive cut-off date after which a stay should be presumptively lifted, and courts focus on the stage, rather than the age, of the receivership when determining whether to lift the stay." United States v. Petters, No. CV 08-5348 ADM/TNL, 2017 WL 4325684, at *6 (D. Minn. Sept. 27, 2017) (denying motion to lift nine-year old litigation, since Receiver was actively pursuing litigation to recover funds). Courts applying this factor consider not only the stage of the receivership but also but the stage of any litigation against third parties initiated by the receiver:

> The District Court also weighed the second factor—the time in the course of the receivership—in favor of maintaining the stay. Timing in a receivership process is fact specific, based on the number of entities, the complexity of the scheme, and any number of other factors. *See Wencke II*, 742 F.2d at 1231–32; *SEC v. Universal Fin.*, 760 F.2d 1034, 1039 (9th Cir. 1985). At the time of the District Court's order, the receivership had been in place for one year. The District Court found that the alleged Ponzi scheme was complex and intricate, involving many entities and billions of

> dollars. **Additionally, satellite litigation instigated by the Receiver on behalf of the estate was just beginning.** Therefore, the District Court held that the receivership was in its early stages and that the interest of the Receiver in continuing to marshal and conserve the estate outweighed the Appellants' claims at this time.
>
> [Emphasis supplied]

S.E.C. v. Stanford Int'l Bank Ltd., 424 F. App'x 338, 341–42 (5th Cir. 2011).

This factor clearly weighs in favor of maintaining the litigation stay. The Federal Action is in its infancy, and the Receivership itself is only a year and a half old. The particular settlement that Prospect is attempting to preclude is even younger: Prospect seeks to bring suit to invalidate transfers that, theoretically, may not be approved by the federal district court, which has yet to receive full briefing on the pending motion to preliminarily approve the proposed settlement, much less issue a ruling on such motion.[12] Indeed, Prospect is presently attacking that very settlement in U.S. District Court on the same ground:

> The [U.S. District] Court should not approve the Settlement Agreement because it proposes to transfer CCCB's membership interest in Prospect Chartercare to the Receiver in direct contravention of the LLC Agreement. . . . As such, the purported transfers contemplated by the Settlement Agreement violate the LLC Agreement and constitute invalid transfers under the LLC Agreement; therefore, the Court should not approve the Settlement Agreement.

Joint Memorandum of Defendants' Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect CharterCare, LLC, Prospect CharterCare SJHSRI, LLC and Prospect CharterCare RWMC, LLC's [sic] in Opposition to Joint Motion for Settlement

[12] While the Receiver presently owns an interest in Prospect Chartercare, the Court has instructed the Receiver to refrain "from exercising any rights under the PSA [Proposed Settlement Agreement] prior to the federal court's determination of whether to approve the PSA" or from directing CCCB to exercise rights on the Receiver's behalf. See November 16, 2018 Order. Thus, any injury to Prospect caused by the transfer to the Receiver, even assuming (*arguendo*) such transfer is prohibited by the LLC Agreement (which it is not), is utterly hypothetical.

Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval of [sic] St. Joseph Health Services of Rhode Island, Roger Williams Hospital, and CharterCare Community Board, Del Sesto et al. v. Prospect CharterCare, LLC et al., 18-cv-00328-WES-LDA (D.R.I.), Dkt # 75-1 (filed December 24, 2018) at 26-27.

Prospect asserts that "this receivership is not at a stage where the Lawsuits should be enjoined" because the Receiver "has had ample time to collect and assume control over the estate." Prospect's Memo. at 18. Prospect's argument is essentially that because the Receiver has had an opportunity to try to formalize a settlement agreement with CCCB, Prospect should now receive an opportunity to attack that Settlement Agreement in Delaware before it is fully implemented. Prospect's argument fails to recognize how the Settlement Agreement itself is an effort to collect and assume control over estate property and is presently pending before the federal district court.

Prospect also brings this motion soon after Prospect CharterCare, LLC, without Court permission, filed administrative proceedings attacking the settlement in violation of the same litigation stay. Indeed, Prospect does not even wait for the Court to issue its decision on whether to hold Prospect CharterCare, LLC in contempt for such prior violations, before plunging ahead with the instant motion.

C. The merits of Prospect's underlying claim (here none) do not favor lifting the stay

Under the third Wencke factor, courts consider "the merit of the moving party's underlying claim." S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984). "The more meritorious a movant's underlying claim, the more heavily this factor will weigh in the movant's favor." United States v. JHW Greentree Capital, L.P., No. 3:12-CV-00116

(VLB), 2014 WL 12756827, at *7 (D. Conn. May 16, 2014). "However, even meritorious claims may not tip the scales in favor of lifting a litigation stay where the first and second prongs" of the inquiry "favor the receiver." Id. at *8. This factor also supports maintaining the receivership stay.

Prospect contends that because it has "colorable claims" that the Settlement Agreement violates the LLC Agreement, the Court should lift the stay and permit Prospect to litigate those claims in Delaware. For lifting a receivership stay to be considered, *at least* a colorable claim must be asserted. See United States v. Acorn Tech. Fund, L.P., 429 F.3d 438, 444 (3d Cir. 2005) ("If it appears that a claim has no merit on its face, that of course may end the matter."). That does not mean that merely colorable claims are sufficient to warrant lifting the stay: the test is "the more meritorious a movant's underlying claim, the more heavily this factor will weigh in the movant's favor," not that a claim with any merit whatsoever is sufficient.

Moreover, here, for the reasons extensively briefed in reply to Prospect's objections to the settlement, Prospect's arguments that the settlement's transfers of CCCB's hospital interests violate the LLC Agreement are not even colorable on their face.[13] See Receiver's Reply Memorandum (filed October 5, 2018) at 29-38 (explaining how the Receiver obviously falls within the LLC Agreement's definition of "affiliates" to whom such interests may be freely transferred).[14] Rather than ever grappling with this fact, Prospect simply "put[s] that issue aside." Prospect's Memo. at 20. By putting

[13] Prospect's indemnity claims are also meritless, and meritless claims cannot justify lifting a litigation stay. See, e.g., S.E.C. v. Utsick, 373 F. App'x 924, 926 (11th Cir. 2010) (district court did not err in declining to lift receivership stay to permit lawsuit in Delaware to obtain indemnity).

[14] In addition to Receiver's other arguments pressed therein.

aside the merit of its claims, Prospect fails to meet it burden under the third Wencke factor.

Prospect also contends:

> The Rhode Island Supreme Court, in *Reynolds v. First NLC Fin. Servs., LLC*, has determined with reference to an automatic stay provision in the bankruptcy context that granting a [sic] relief from stay [sic] "is merely a summary proceeding of limited affect [sic]," which is [sic] "determination of whether the parties seeking relief has a colorable claim to the property of the estate," and a decision on a motion for relief from stay "is not a determination of the validity of those claims, but merely a grant of permission from the Court allowing the creditors to litigate its substantive claims elsewhere without violating the automatic stay."

Prospect's Memo. at 19 (characterizing and garbling Reynolds v. First NLC Fin. Servs., LLC, 81 A.3d 1111, 1117 (R.I. 2014)). This is not an accurate characterization of Reynolds, in which our Supreme Court was simply summarizing the procedural history of one First Circuit bankruptcy decision in the course of distinguishing it. See id. at 1117-18 (observing that the bankruptcy court in Reynolds's bankruptcy proceeding had actually determined the validity of the mortgage sale of Reynolds's property on the merits, which entitled such determination to res judicata, distinguishing Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 28 (1st Cir. 1994), cited by Reynolds, in which no such determination had been made).

IV. The Court should not grant Prospect leave to refile its administrative petitions

Attorney General has informed the Court that Prospect's Petition for Declaratory Order pursuant to R.I. Gen. Laws § 42-35-8 is meritless. See Reply of the Rhode Island Attorney General to Certain Parties' Objections to the Receiver's Petition for Settlement Instructions (filed October 5, 2018). See id. at 4 (Prospect "cannot invoke the APA [Rhode Island Administrative Procedures Act] in seeking review of any aspect of the

HCA Decision . . . ."); id. at 4 ("[T]he Prospect Entities incorrectly assume that consummation of the Proposed Settlement Agreement is precluded by the doctrine of administrative finality. . . ."). Permitting Prospect to refile its administrative petitions would be an exercise in utter futility.

Prospect's Petitions are also meritless for additional reasons set forth in the Receiver's prior Memorandum of Law in Support of His Motion to Adjudge Prospect CharterCare, LLC in Contempt (filed October 5, 2018). For example:

> Much of the Petition for Declaratory Order proceeds from utterly incorrect premises. For example, the Petition for Declaratory Order contains numerous incorrect statements of fact and conclusions of law. See, e.g., Petition for Declaratory Order ¶ 23 ("It is beyond dispute that the Receivership Estate is SJHSRI in its role as Plan Administrator. . . ."); Id. ¶ 71 ("It is beyond dispute that there is an identity of parties between the Conversion and CEC Proceedings and the Federal Court Litigation in that the Acquiror and the Receivership Estate were both Transacting Parties in the Conversion and CEC Proceedings."). These "facts" are claimed by Prospect Chartercare to be "beyond dispute" notwithstanding that they are not only actually disputed but indeed are palpably absurd. The Receivership Estate is the Plan, not SJHSRI who petitioned the Plan into receivership. The Plan was and is not a "transacting party" in the "Conversion and CEC Proceedings." Indeed, the Attorney General takes a diametrically opposite position on this issue, stating [correctly] that the Receiver and the named Plan participants identified as the Plaintiffs in the Settlement Agreement "were not 'transacting parties' in the 2014 conversion." Attorney General's Response to the Receiver's Petition for Settlement Instructions at 7.
>
> Much of the Petition for Declaratory Order also proceeds from astonishingly gross misreadings of the Hospital Conversions Act ("HCA").
>
> For example, the Petition for Declaratory Order presupposes that the transfer of 15% of the membership units in Prospect Chartercare (which in turn owns the two LLC companies that own the hospitals), constitutes a "Conversion" within the meaning of R.I. Gen. Laws § 23-17.14-4(6), i.e. "a change of ownership or control or possession of twenty percent (20%) or greater of the members or voting rights or interests of the hospital or of the assets of the hospital. . ." Petition for Declaratory Order at 15-16. However, the term "hospital" is defined in the HCA as "a person or governmental entity licensed in accordance with chapter 17 of this title."

> R.I. Gen. Laws § 23-17.14-4(4). Prospect Chartercare is not and never has been licensed to operate a hospital.
>
> To the contrary, the hospital licensees in the for-profit operation are Prospect Chartercare St. Joseph (Fatima Hospital) and Prospect Chartercare Roger Williams (Roger Williams Medical Center). Prospect Chartercare is the sole member in those entities, but the Proposed Settlement does not affect Prospect Chartercare's membership in those entities, which remains unchanged at 100%. What it affects is only CCCB's membership interest in Prospect Chartercare. In other words, the Proposed Settlement has zero effect on "an ownership or membership interest or authority in a hospital, or the assets of a hospital," which is a sine qua non for a "conversion" under the HCA. R.I. Gen. Laws § 23-17.14-4(6). Accordingly, as a matter of law, transfer of CCCB's membership interests in Prospect Chartercare cannot constitute "a change of ownership or control or possession of twenty percent (20%) or greater." . . .

Id. at 16-17. See also id. at 17-20.

Prospect's Petitions were also procedurally defective for failing to join the Receiver and the other settling parties as interested parties, seeking instead to prejudice those parties' interests in their absence. The fact Prospect cannot do so without dissipating receivership assets is another independent basis for denying this motion.

Prospect also does not explain why the Department of the Attorney General and the Health Department are incapable of protecting their own regulatory turf. Assuming (*arguendo*) that Prospect's Petitions have any merit (which the Attorney General agrees they do not), the Attorney General and Department of Health are free to investigate these issues and seek to institute any appropriate administrative proceedings without being called upon to do so at Prospect's behest.

CONCLUSION

For all of the foregoing reasons, the Prospect's motion should be denied.

Respondent,
Stephen F. Del Sesto, Esq., Solely in His Capacity as Permanent Receiver of the Receivership Estate,
By his Attorneys,

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