Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 10/5/2018 3:03 PM
Envelope: 1746265
Reviewer: Alexa G.

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| STATE OF RHODE ISLAND<br>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 | : | |

**THE RECEIVER'S REPLY TO OBJECTIONS TO THE RECEIVER'S PETITION FOR SETTLEMENT INSTRUCTIONS**

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October 5, 2018

# TABLE OF CONTENTS

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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 to reply to objections filed by CharterCARE Foundation (""CC Foundation") and various Prospect entities[1] ("Prospect East"), and the "Response" filed by the Rhode Island Attorney General ("Attorney General") (referred to collectively as the "Objectors") to the Receiver's Petition for Settlement Instructions. The Receivership Estate is the Plan on which 2,729 individuals depend for benefits to support themselves and their families in retirement. The Receiver apologizes for the length of this submission, which is the result of responding to three sets of objections, totaling over 309 pages including documents the Objectors ask the Court to read as exhibits. The Receiver submits a single memorandum, instead of separate replies to each Objector's memorandum, to avoid burdening the Court with the repetition of arguments on the many overlapping issues and arguments.

## BACKGROUND

The Receiver has requested authority to proceed with the proposed settlement ("Proposed Settlement") of claims the Receiver has asserted against CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (collectively the "Settling Defendants"), in a lawsuit filed in the United States District Court for the District of Rhode Island (C.A. No:

[1] The Prospect entities that have filed a "joint objection" are Prospect Medical Holdings, Inc. ("Prospect Medical"), Prospect East Holdings, Inc. ("Prospect East") (misnomered by Prospect as "Prospect East Medical Holdings, LLC"), Prospect CharterCare, LLC ("Prospect Chartercare"), Prospect CharterCare SJHSRI, LLC ("Prospect Chartercare St. Joseph"), and Prospect Chartercare RWMC, LLC ("Prospect Chartercare Roger Williams"). However, as discussed herein, their objections are based primarily on alleged breaches of a limited liability company agreement to which CCCB and Prospect East are parties, and the Prospect entities do not differentiate amongst themselves for purposes of any of their objections to the Proposed Settlement. Accordingly, these entities are referred to collectively as "Prospect East."

1:18-CV-00328-WES-LDA) (the "Federal Court Action"), and in a lawsuit filed in the Rhode Island Superior Court (C.A. NO.: PC-2018-4386) (the "State Court Action").

If this Court accepts the Receiver's recommendation, the next step will be that the Receiver's Special Counsel and counsel for the Settling Defendants will file a motion in the Federal Court Action asking that the Proposed Settlement be approved by that court, because the Federal Court Action includes a class action, and judicial approval of settlements of class actions is required under Rule 23(e) of the Federal Rules of Civil Procedure, and because judicial approval of a good faith settlement is a condition for the Receivership Estate to obtain the benefits of the recently enacted Rhode Island statute specifically addressed to settlements involving the Plan, R.I. Gen. Laws § 23-17.14-35.

## ARGUMENT

### I. Standard for Settlement Approval Contingent on Approval of Another Court

As set forth below, there are recognized standards applicable to the situation in which a receiver requests settlement authority from a receivership court and that court's approval is all that is required for the receiver to conclude the settlement. However, that is not our situation. Here the Receiver is asking this Court for authority to seek settlement approval from another court. There does not appear to be (and the Objectors have failed to cite) any established standard directly applicable to this scenario.

The two levels of judicial approval should be acknowledged and addressed, however, since they raise issues of possible overlap and duplication of rulings between the two proceedings. Unfortunately, and notwithstanding that this was the principal issue discussed in the nearly two-hour joint scheduling telephone conference called by

the Honorable Brian Stern of this Court and Chief Judge William Smith of the Federal Court on the morning of September 26, 2018, none of the Objectors suggest how it should be addressed. Indeed, they do not even acknowledge the issue, with the exception of the final sentence in CC Foundation's memorandum.[2]

It is respectfully submitted that there are logical divisions between the two proceedings, which reasonably and properly would support an allocation of issues between the two courts. This Court appointed the Receiver, and is administering and overseeing the Receivership Proceeding, such that this Court needs to determine whether the Proposed Settlement is in the best interests of the Receivership Estate. It is not necessary, however, for this Court to consider the impact of the Proposed Settlement on the rights of the Defendants (including the Objectors). Those Defendants and the Attorney General are not parties to the Receivership Proceedings.[3] Moreover, as discussed below, the Objectors' claims that the Proposed Settlement improperly affects their legal rights are intertwined with the merits of the Receiver's claims against CC Foundation, Prospect East, and the other Defendants in the Federal Court Action. Finally, the Proposed Settlement cannot be implemented unless and until the Federal Court approves it, such that the impact on the Objectors' rights if this Court approves the Proposed Settlement at this time is at best speculative.

[2] CC Foundation asserts all of its substantive arguments, asks the Court to reject the Proposed Settlement, and then states that "if this Court is not inclined at this juncture to address CCF's objections to the legality of the Settlement Agreement terms regarding CCF, then this Court should make clear in its ruling that CCF's right to raise these objections is expressly reserved for subsequent determination by the federal court." CC Foundation Objection at 18.

[3] They have appeared in the Receivership Proceedings solely because Special Counsel subpoenaed their documents and the Court issued orders applicable to their document production.

In these circumstances, one solution may be to limit the issue before this Court in connection with the Petition for Settlement Instructions to whether it is in the best interests of the Receivership Estate for the Receiver to proceed with the Proposed Settlement, reserving all other possible objections to be heard in the Federal Court Action, including the Objectors' claims that the Proposed Settlement somehow unfairly prejudices their interests or the interests they purport to represent. If this Court concludes that it is in the best interests of the Receivership Estate for the Receiver to proceed with the Proposed Settlement, the Receiver will file his motion for settlement approval in the Federal Court. CC Foundation and Prospect East certainly will have standing in the Federal Court Action, where at least they are parties, and, if he meets the requirements, the Attorney General can intervene to interpose any objections he may have. The Objectors will be entitled to be fully heard in the Federal Court Action on all of their objections to the Proposed Settlement, subject, of course, to the right of the Federal Court to conclude that those objections are premature until the Receiver actually asserts claims against in an adversary proceeding, in which event those adversary proceedings will be the opportunity for the Objectors to make their arguments in defense of the Receiver's claims.

If any of the parties disrespect this allocation of issues between the two courts, and seek to raise in the Federal Court Action the issue of whether the Proposed Settlement is in the best interests of the Receivership Estate, the Federal Court will presumably abstain from reconsidering that issue based on comity, and in deference to the fact that the Receivership Proceedings preceded the Federal Court Action and the Court in the Receivership Proceedings has exercised jurisdiction over the entirety of the

Receivership Estate. Foremost, the determination of what is in the best interests of a state court receivership is for the receivership court.

Although we have not found any precedent dealing with this issue in the exact context of two levels of judicial approval for a proposed settlement, this is not the first case involving a possible conflict between a state court receivership proceeding and a federal court action. Here the Court is considering the settlement of claims of the Receivership Estate, and a Settlement Agreement that has been fully executed and constitutes an asset of the Receivership Estate subject to court approvals. The general rule in such circumstances is that the state court receivership proceeding is entitled to deference if it preceded the federal court action. See Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962), in which the federal court abstained from adjudicating rights to property in the receivership estate, stating as follows:

> State courts are as equally free as federal courts from interference with property in their possession. The Supreme Court has consistently upheld state court receiverships first assuming jurisdiction. . . . We think the fact that the proceeds have not yet been paid into the Florida Court by the defendants is immaterial on the question of whether those proceeds are an asset of the insolvent estate under the jurisdiction of the Florida Court so that a cause of action involving them cannot be maintained elsewhere. "The principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals."

Id., 211 F. Supp. at 237 (quoting Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939)) (other citations omitted).

Alternatively, if this Court hears and decides *all* possible objections to the Proposed Settlement, and not merely objections pertaining to whether the Proposed

Settlement is in the best interests of the Receivership Estate, and if the Court ultimately authorizes the Receiver to proceed with the Proposed Settlement by taking the next step of seeking approval in the Federal Court Action, then it is clear that the Objectors should not be permitted to re-litigate their objections in connection with the request for settlement approval in the Federal Court Action.

However, such preclusion will not necessarily be easy to apply. For example, it will require the Federal Court to determine what objections were made to and resolved by the Court, and whether any objections not made to the Court are waived because they should have been made. Both of those questions not only will further complicate the proceedings in Federal Court, but also may raise possible issues concerning issue preclusion that may be seized upon as grounds for appeal to the First Circuit.

Those complications for the Federal Court could be avoided (or, at the very least, greatly mitigated) if this Court, instead of adjudicating all possible objections to the Proposed Settlement, limits the issue before the Court to whether it is in the best interests of the Receivership Estate for the Receiver to proceed with the Proposed Settlement, leaving any other possible objections to be dealt with in the first instance by the Federal Court. The Objectors do not claim this would be prejudicial, and, indeed, it is difficult to conceive how parties objecting to the Proposed Settlement would be prejudiced by such a division of issues and responsibilities between this Court and the Federal Court.

## II. Standard for Settlement Approval in Receivership Proceedings

### A. The Applicable Standard

The first point to consider is that the Receiver's goal and duty is to attempt to maximize the Receivership Estate. "A receiver . . . must 'endeavor to realize the largest

possible amount for assets of the estate.' " Golden Pacific Bancorp. v. F.D.I.C., 375 F.3d 196, 201 (2d Cir. 2004) (quoting Phelan v. Middle States Oil Corp., 154 F.2d 978, 991 (2d Cir. 1946). That duty includes seeking to achieve the best possible settlement for the receivership estate. In re Bell & Beckwith, 77 B.R. 606, 616 (Bankr. N.D. Ohio 1987) ("The Trustee would, of course, be remiss in his fiduciary duties if he did not use the full extent of his powers to bring about the best possible settlement for the estate of Bell & Beckwith.").

The First Circuit has held that, in bankruptcy proceedings in which the trustee seeks court approval to enter into a proposed settlement, the court "is expected to 'assess [ ] and balance the value of the claim[s] ... being compromised against the value ... of the compromise proposal.' " " In re Heathco Int'l, Inc., 136 F.3d 45, 51 (1st Cir. 1998) (quoting Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995)) (citation omitted). "A settlement agreement should be approved as long as it does not 'fall below the lowest point in the range of reasonableness.' " In re Heathco Int'l, Inc., 136 F.3d 45, 51 (1st Cir. 1998) (quoting In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983)). See also In re Mailman Steam Carpet Cleaning Corp., 212 F.3d 632 (1st Cir. 2000) (stating that the test is whether the trustee's actions fall within the universe of reasonable actions, as opposed to whether pressing forward might yield more funds).

According to the First Circuit, in determining whether to approve a settlement, the Court should consider the following factors:

a) The probability of success in the litigation being compromised;

b) The difficulties to be encountered in the matter of collection;

c) The complexity of the litigation involved and the expense, inconvenience and delay in pursing the litigation; and

d) The paramount interest of the creditors and a proper deference to their reasonable views.

Cf. Jeffrey v. Desmond, 70 F.2d 183, 185 (1st Cir. 1995) (bankruptcy context). The "paramount interests of the creditors" in this case are the interests of 2,729 Plan participants in their retirement benefits, who may face severe *pro rata* reductions of their benefits if the Receiver is unable to recover sufficient sums in litigation to fund the Plan. Moreover, the Plan participants include different groups and many different individuals who assert that, if benefits are going to be cut, their own needs are entitled to preference over the needs of other Plan participants. However, these issues of a cut in benefits and the conflicts between Plan participants need never be addressed by the Court if the Receiver is successful.

The federal standards enumerated in the First Circuit have been applied by the Rhode Island Superior Court in receivership proceedings. See, e.g., Brook v. The Education Partnership, Inc., No. PB 08-4185, 2010 WL 1456787, at *3 (R.I. Super. Apr. 8, 2010) (Silverstein, J.). In Brook v. The Education Partnership, Inc., the Superior Court held:

> As discussed supra, in determining whether to approve the Receiver's proposed settlement the Court must consider certain factors and "assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." Among the factors to be considered are: (1) the probability of success in the litigation; (2) the likelihood of difficulties in collection of any judgment; (3) the complexity, expense, inconvenience, and delay of the litigation involved; and (4) the paramount interests of the creditors. The Court will also give deference to the Receiver's business judgment.

Id. at *5 (internal citations omitted).

Considerable weight is to be given to the Receiver's recommendation:

> When analyzing a proposed sale of property by a receiver, courts apply the highly deferential "business judgment" standard. See, e.g., *Golden Pacific Bancorp v. Fed. Deposit Ins. Corp.*, No. 95 Civ. 9281(NRB), 2002

> WL 31875395, at *9 (S.D.N.Y. Dec. 26, 2002) aff'd by 375 F.3d 196 (2d Cir. 2004). This standard is identical to the test courts use to analyze whether other fiduciaries, such as bankruptcy trustees, acted in accordance with their fiduciary duties. See, e.g., *In re Bakalis*, 220 B.R. 525, 531–32 (Bankr. E.D.N.Y. 1998) (challenges to a bankruptcy trustee's discretion when selling estate property are judged under the highly deferential business judgment test). Here, the task of this Court is not to decide whether it agrees with the Receiver's decision but, rather, whether the Receiver exercised his discretion in a reasonable manner, in good faith, and for sound business reasons. See *Bank of N.Y. Mellon v. Ret. Bd. of the Policemen's Annuity & Benefit Fund of the City of Chi. (In re Bank of N.Y. Mellon)*, 127 A.D.3d 120, 125–26 (1st Dept. 2015) (a fiduciary comports with his fiduciary duty if he exercises his discretionary power "reasonably and in good faith"); Corbin v. Fed. Reserve Bank of N.Y., 475 F. Supp. 1060, 1071 (S.D.N.Y. 1979) (receiver does not breach fiduciary duty if he exercises "reasonable business judgment").

Lawsky v. Condor Capital Corp., 2015 WL 4470332 *6 (S.D.N.Y. 2015).

"A nonsettling defendant does not ordinarily have standing to object to a court order approving a partial settlement since the nonsettling defendant is generally not affected by the settlement." In re Viatron Computer Systems Corp. Litigation, 614 F.2d 1, 6 (1st Cir. 1980). "This rule advances the policy of encouraging the voluntary settlement of lawsuits." Waller v. Fin. Corp., 828 F.2d 579, 583 (9th Cir. 1987). "Thus, '[w]hen the partial settlement reflects settlement by some defendants, appeals by nonsettling defendants have been dismissed, on grounds that mingle concerns of standing with finality concerns.' " In re Integra Realty Resources, Inc., 262 F.3d 1089, 1102 (10th Cir. 2001) (quoting 15B Wright, Miller & Cooper, Federal Practice & Procedure § 3914.19 (2d ed. 1991 & 2001 Supp.) (footnote omitted).

### B. The Receiver Has Not Overstepped the Authority Granted Him by the Court

Prospect East lodges the irresponsible accusation that the Receiver has overstepped his authority, by "enter[ing] into a Settlement Agreement without first having sought instructions from the Court." Prospect East Memo. at 7. Not content to

aggrandize to themselves a right to object after-the-fact to a settlement to which they are not parties, Prospect East essentially demands a seat at the negotiating table "before the parties finalized their agreement." Id. Of course, if Prospect East were informed of the Proposed Settlement before the Settlement Agreement was signed and became an asset of the Receivership Estate, then Prospect East or its affiliates would have attempted to prevent the settlement outside of the Receivership Proceedings, which they are now forbidden to do since any interference with the Settlement Agreement would interfere with property of the Receivership Estate, and violate the injunction against such proceedings set forth in the Order Appointing Permanent Receiver.[4]

In short, Prospect East's objection to the fact that the Receiver entered into the Settlement Agreement without notice to the non-settling Defendants is just sour grapes over having missed that opportunity to block the settlement. It also ignores that the Court has already granted the Receiver the authority—indeed ordered him—to take all the actions he has taken. In the Order Appointing Permanent Receiver (entered October 27, 2017), the Court ordered the Receiver to "pursue and preserve all of its [the Plan's] claims." Id. ¶ 4. The Court authorized the Receiver "to take any and all actions or expressly delegate the same which, prior to the entry of this Order, could have been taken by the officers, directors, administrators, managers, and agents of the

[4] See Order Appointing Permanent Receiver (entered October 27, 2017) ¶ 15. The Receiver has filed his motion to adjudge Prospect Chartercare in contempt for filing on September 27, 2018 a Petition for Declaratory Order with the Attorney General, which seeks to invalidate the Settlement Agreement and bar the Receiver from exercising his rights to CCCB's 15% interest in Prospect Chartercare. That Petition constitutes a clear interference with the property and assets of the Receivership Estate in violation of this Court's Order Appointing Permanent Receiver. Prospect Chartercare's willingness to violate the Court's order suggests that, given the opportunity, Prospect Chartercare would have gone to great lengths to attempt to block the Settling Defendants from even entering into a binding settlement with the Receiver.

Respondent." Id. ¶ 4. The Court authorized the Receiver "to collect and receive the debts, property and other assets and effects of said Respondent, with full power to prosecute, defend, adjust **and compromise** all claims and suits of, by, against, or on behalf of said Respondent". Id. ¶ 5 (emphasis supplied).

Far from requiring further instructions from the Court before taking any of the foregoing actions, the Receiver is not only authorized but expressly directed by the Court to perform them, unless and until the Court provides further instructions:

> 12. That the Receiver shall continue to discharge said Receiver's duties and trusts hereunder until further order of this Court; that the right is reserved to the Receiver and to the parties hereto to apply to this Court for any other or further instructions to said Receiver and that this Court reserves the right, upon such Notice, if any, as it shall deem proper, to make such further orders herein as may be proper, and to modify this Order from time to time.

Order Appointing Permanent Receiver ¶ 12.

Prospect East cites Manchester v. Manchester, 181 A.2d 235 (R.I. 1962) and Cavanagh v. Cavanagh, 375 A.2d 911, 920 (R.I. 1977) for the propositions that a receiver is an instrumentality of the Court and serves the Court rather than representing any particular party. See Prospect East Memo. at 6. Those banal propositions do not advance Prospect East's position that the Receiver cannot enter into a settlement agreement that is subject to multiple rounds of judicial approval before first seeking permission to enter into that settlement agreement (*i.e.* the settlement agreement that is subject to multiple rounds of judicial approval). Such a requirement would both be unduly cumbersome and disadvantage the Receivership Estate by requiring the Receiver to publish his reasons for recommending a settlement before the terms of the settlement are agreed, to the possible prejudice of the Receivership Estate if settlement terms are not finally agreed upon. It would also require the Court to approve a

hypothetical settlement with no binding assurance it can be achieved. The much better course, and the approach the Receiver has taken, is to negotiate and execute a binding settlement subject to court approval.

## III. The Objections of the Non-Settling Defendants and the Attorney General Are Irrelevant to this Proceeding, Premature and Non-Justiciable

The Objectors fail to even address the factors outlined above, governing settlement approval in receivership proceedings, or the fundamental issue of whether the Proposed Settlement represents a favorable outcome for the Receivership Estate and the Plan participants. Notably, no creditor and no one with a beneficial interest in the Receivership Estate is objecting. To the contrary, hundreds of Plan participants support the Proposed Settlement through the submissions of Attorneys Violet, Kasle, and Callaci on their behalf.

Instead, the Objectors seek to prevent the Proposed Settlement because they allege it is unfair to Prospect East and CC Foundation as putative *debtors*[5] of the Receivership Estate, and to the Attorney General who is purportedly proceeding on behalf of the donors of the alleged charitable assets of CC Foundation, and pursuant to his alleged rights and powers under the Hospital Conversions Act.

Those objections are not even relevant to whether the Proposed Settlement represents a favorable outcome for the Receivership Estate. Instead, they seek to change the focus from the core issue of whether the Proposed Settlement is in the best interests of the Receivership Estate and Plan participants, to whether it should be

[5] Based on the claims the Receiver has asserted against them in the Federal Court Action, the State Court Action, and the 2015 *Cy Pres* Proceeding in which the Receiver has just been permitted to intervene.

rejected because it impacts the Objectors' interests, even if rejecting the Proposed Settlement irretrievably damages the interests of the Receivership Estate and the Plan participants.

The requirement for standing on that basis, however, places on the objecting parties "the burden of demonstrating that [he or] she will suffer 'plain legal prejudice' through effectuation of the settlement," and is "narrowly construed and occurs only when a partial settlement deprives a non-settling party of a substantive right." 4 Newberg on Class Actions § 13:24 (5th ed.) (citations omitted). "[A] showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient. . . ." Quad/Graphics, Inc. v. Fass, 724 F.2d 1230, 1233 (7th Cir. 1983). As the court stated in Quad/Graphics:

> [W]e do not believe that a court should inquire into the propriety of a partial settlement merely upon a showing of factual injury to a non-settling party. **Some disadvantage to the remaining defendants is bound to occur and may, in fact, be the motivation behind the settlement.** But just as a court has no justification for interfering in the plaintiff's initial choice of the parties it will sue (absent considerations of necessary parties), the court should not intercede in the plaintiff's decision to settle with certain parties, unless a remaining party can demonstrate plain legal prejudice.

Quad/Graphics, Inc. v. Fass, *supra*, 724 F.2d at 1233 (emphasis supplied).

This is, after all, litigation, and it must be assumed that the non-settling Defendants will exercise all of their rights to the fullest, to hinder the Receiver's pursuit of claims against them. Why cannot the Receiver exercise his rights, and negotiate a settlement with one party that includes the transfer of rights to improve the Receiver's position against non-settling Defendants? See Quad/Graphics v. Fass, *supra* ("Some disadvantage to the remaining defendants is bound to occur and may, in fact, be the motivation behind the settlement.").

The typical interest which may confer standing on non-settling parties to be heard in opposition to (but not necessarily require rejection of) a proposed settlement is if the Court's approval of the proposed settlement will affect their rights of contribution. See Waller v. Fin. Corp. of Am., 828 F.2d 579, 583 (9th Cir. 1987) ("[A] nonsettling 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."). The Court's approval of the Proposed Settlement will not affect the non-settling Defendants' rights of contribution, however, since that issue will be addressed when the Receiver applies to the Federal Court for judicial approval of this as a good faith settlement under the recently enacted Rhode Island statute, R.I. Gen. Laws § 23-17.14-35, which specifically addresses the effect of settlements involving the Plan on the contribution rights of non-settling defendants.

Indeed, it is indisputable that *this Court's* allowance for the Receiver to proceed with the Proposed Settlement *will not* legally prejudice any of the Objectors' legal rights, because the only consequence of that allowance should[6] be the Receiver's application to the Federal Court for settlement approval. The Federal Court must approve the Proposed Settlement for its substantive terms to go into effect. Thus, the determination of whether the Proposed Settlement deprives the Objectors of substantive legal rights is premature, and cannot be made unless and until the Federal Court approves the Proposed Settlement, and the terms on which the approval is based are known.

[6] That assumes, however, that the Objectors do not cause the Court to have to address the merits of the claim that the Settlement Agreement prejudices their interests. In that case, the Receiver reserves the right to argue in the Federal Court that this Court's determination of those claims should be given preclusive effect, under issue preclusion, abstention, or any other potentially applicable law.

In other words, the issue of whether the Proposed Settlement deprives the Objectors of substantive legal rights is not presently justiciable, because the possible effect of another court's future decision does not meet the basic requirements to make a dispute a justiciable controversy.

> For a justiciable controversy to exist, "two elemental components must be present: (1) a plaintiff with the requisite standing and (2) 'some legal hypothesis which will entitle the plaintiff to real and articulable relief' " *N & M Properties, LLC*, 964 A.2d at 1145 (quoting *Bowen v. Mollis*, 945 A.2d 314, 317 (R.I. 2008)). "The standing inquiry is satisfied when a plaintiff has suffered '[some] injury in fact, economic or otherwise.' " Id. (quoting *Bowen*, 945 A.2d at 317). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not 'conjectural' or 'hypothetical.' " Id. (quoting *Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997)).

Warwick Sewer Authority v. Carlone, 45 A.3d 493, 499 (R.I. 2012). The 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."

Moreover, even the proceedings for settlement approval in the Federal Court may not implicate the substantive rights of the Objectors, and, therefore, may not even possibly cause them an injury-in-fact. The Federal Court may well approve the Proposed Settlement without prejudice to the Objectors' claims, and leave those issues until the Receiver actually asserts the rights which the Objectors claim are unenforceable. If the Federal Court takes that approach, it will only be in subsequent proceedings that there may be a justiciable controversy over whether enforcement of the rights the Receiver obtains in the Proposed Settlement will inflict a legally cognizable injury on the Objectors, or the interests they claim to represent.

That ruling would be consistent with the general rule that claims by a receiver against putative debtors of the receivership estate, or by a bankruptcy trustee against

debtors of the bankruptcy estate, are determined in adversarial proceedings, when the receiver/trustee is asserting claims against and seeking a recovery from putative debtors, not before the actual assertion of a claim by the receiver/trustee has defined the issues in a concrete dispute.

Thus, courts have denied efforts by putative debtors to preclude bankruptcy trustees in advance of the trustees actually asserting claims against them. For example, in In re Hartley, 36 B.R. 594 (Bankr. N.D. Ohio 1983), the court rejected the efforts of parties who sought to require the bankruptcy trustee to demonstrate probable cause before he would be authorized to bring claims against those parties, stating that "[t]he Court also rejects the claim that it can enjoin any threatened lawsuit resulting from an investigation or require the Trustee to show probable cause as a precondition to initiation of any such litigation." Id. at 596. The court stated as follows:

> The merits of the Trustee's claim, if any, against a third party should be determined in whatever forum the trustee eventually initiates his claim, see, *Palmer v. Travelers Insurance Co.*, 319 F.2d 296 (5th Cir. 1963), and should not be preempted by this Court.
>
> * * *
>
> The Court should not and will not rule on the merits of the Trustee's claim, if any, other than in an appropriate adversarial proceeding initiated on the claim.

Id. at 597. Similarly, in Commodity Futures Trading Com'n v. Chilcott Portfolio Management Inc., 713 F.2d 1477 (10th Cir. 1983), the Court of Appeals affirmed the trial court's order that the equity receiver appointed by the trial court had capacity to assert certain third party claims, and both the trial court and the Court of Appeals refused to consider objections to the receiver's standing to assert those claims based on the alleged lack of injury to the Receivership Estate. The Court of Appeals stated:

> These questions require some consideration of the merits and the District Court felt the standing question should be left to Judge Carrigan in the Receiver's action and other Judges presiding in other suits brought by the Receiver. We agree and likewise do not treat the standing question.

Id., 713 F.2d at 1482-83.

Similarly, in Campbell Investors v. TPSS Acquisition Corp., 787 N.E.2d 78 (Ohio App. 2003), the Ohio Court of Appeals affirmed a trial court order holding that a receiver in settlement of a receivership claim could properly take an assignment of claims against a party against whom the receiver had already asserted fraudulent transfer claims, over objections by that party that that the assignment should not be allowed because the assigned claims against it had no merit. The appellate court described the issues as follows:

> Appellant next asserts that the trial court erred in approving the assignment agreement because the claims that [the Receiver] DeNune seeks to add to his federal suit are frivolous. More specifically, appellant contends that because the federal court will likely dismiss the [assigned] claims for lack of standing and/or *res judicata*, the trial court should have denied DeNune's motion. The merit of the receiver's [direct fraudulent transfer] claims against [the party] Consolidated, however, was not before the trial court and is not before this court.

Id., 78 N.E.2d at 81. The court refused to even consider the merits of the assigned claims, but, instead, based its affirmance on the fact that the merits of the assigned claims were intertwined with the fraudulent transfer claims, stating:

> Accordingly, the subject of the assignment agreement, including the promissory note, is extensively intertwined with the allegedly fraudulent conveyances and conversion that the receiver has asserted deprived the TPSS creditor's of their property. Under these circumstances and in light of *Milo*, *supra*, we cannot say that the trial court erred in approving the assignment agreement and permitting the receivership to continue.

Id., 78 N.E.2d at 82 (citation omitted). This case has strong parallels to the case *sub judice*, in which the merits of the claims against CC Foundation and Prospect East that

the Receiver seeks to obtain by assignment are also extensively intertwined with the merits of the Receiver's fraudulent transfer claims against those same defendants.

Similarly, in In re SE Techs., Inc., No. 03-50895 AHWS, 2012 WL 5921198 (Bankr. D. Conn. June 20, 2012), a federal trial court approved a bankruptcy trustee assigning the debtor's legal malpractice claim to a creditor of the bankruptcy estate, to be prosecuted in state court, in return for a share of the recovery, even though the federal court expressed doubt as to whether the claim was assignable. The federal court simply retained jurisdiction over the claim if the state court concluded that the claim was not assignable. Id., 2012 WL 5921198, at *3.

Thus, even Federal Court approval of the Proposed Settlement may not constitute an injury-in-fact. *A fortiori*, this Court's authorization for the Receiver to apply to the Federal Court for approval of the Proposed Settlement does not constitute an injury-in-fact, and, therefore, the Objectors' arguments against the Proposed Settlement are not justiciable at this time.

## IV. The Objectors Can Suffer No Injury from the Settlement Agreement

### A. CC Foundation Can Suffer No Injury from the Settlement Agreement

As discussed below, the rights concerning CC Foundation that the Receiver will obtain under the Settlement Agreement will be enforceable. However, the Court need not even consider that issue, because CC Foundation will suffer no injury whether or not they are enforceable.

Under CC Foundation's by-laws,[7] only a member can elect directors. See Tab 1 at 3. It is undisputed that CCCB, the sole member, did not elect CC Foundation's

[7] Attached hereto at Tab 1.

current acting "directors".[8] Accordingly, if CCCB is in fact CC Foundation's sole member, then those acting directors or whoever else is authorizing this litigation and expending assets under the name of CC Foundation are usurpers, with no legal authority and no right or claim to the assets of CC Foundation. See, e.g., Beraksa v. Stardust Records, Inc., 30 Cal.Rptr. 504, 508 (Cal. App. 2d Dist. 1963) ("A mere usurper, not acting under any color of office, is not a *de facto* officer.") (holding purported directors personally liable to creditors of corporation where directors had been "elected" by pledgee of shares which had no voting rights).

Accordingly, If CCCB is its sole member, then whoever is objecting to the Proposed Settlement under the name of CC Foundation clearly will suffer no legally cognizable injury from the impact of the Proposed Settlement on CC Foundation, because they have no lawful interest in CC Foundation, any more than a thief has a legally cognizable injury when the true owner asserts his property rights.

On the other hand, if CCCB is not CC Foundation's member, then CCCB has no rights to exert over CC Foundation. All CCCB can assign, and all the Receiver seeks, or could seek from CCCB, is whatever rights CCCB has with respect to CC Foundation. In that sense, the assignments the Receiver will obtain from CCCB are akin to quit-claim deeds which receivers commonly take in settlement from settling debtors who are unwilling to warrant their title. If CCCB has no rights, then CCCB has assigned nothing, the Receiver has obtained nothing, and CC Foundation's legal rights have not been prejudiced. The fact that in such circumstances CC Foundation could successfully defend against the claim of the Receiver does not constitute deprivation of a substantive

[8] Indeed, CC Foundation relies on that fact to help support its argument that CCCB abandoned or waived its membership interest in CC Foundation.

right sufficient to confer standing to object to the Proposed Settlement. "[A] showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient…" Quad/Graphics, Inc. v. Fass, *supra*, 724 F.2d at 1233.

It should be noted that if the Proposed Settlement becomes effective, and if the Receiver is able to use CCCB's membership interest to secure CC Foundation's "charitable trust assets in order to use them for the private benefit of Plan participants," it will only be because it is finally determined that CCCB itself had that right and power. In other words, CC Foundation will suffer no prejudice to its legal rights or be in any legally worse position if the Receiver does what CCCB already has the right and power to accomplish. Whatever legal tools that CC Foundation could use to defeat CCCB's efforts will be available to defeat the Receiver.

### B. The Attorney General Also Can Suffer No Injury From the Settlement Agreement

The Attorney General objects to the effect the Proposed Settlement will have on the corporate structure, governance, and charitable assets of CC Foundation. As discussed below, those objections are meritless. But the Court need not even analyze the merits of those claims. Just as with CC Foundation and Prospect East, and whether he is acting on behalf of for the donors of CC Foundation's charitable assets, or in his role under the Hospital Conversions Act, the Attorney General also will suffer no injury from the Settlement Agreement, regardless of the merits of his objections.

If CCCB is not CC Foundation's member, or if CCCB's interests are not assignable, then the Receiver will have no rights to exert over the corporate structure, governance, or charitable assets of CC Foundation. Accordingly, none of the interests that the Attorney General is purporting to protect would be affected. On the other hand,

if CCCB is CC Foundation's sole member, and if CCCB's interests are legally assignable to the Receiver, the Attorney General is not injured by the Receiver's lawful exercise of those rights.

It is also equally true for the Attorney General, as for CC Foundation, that whatever rights the Attorney General would have to prevent CCCB from ultimately securing CC Foundation's "charitable trust assets in order to use them for the private benefit of Plan participants," the Attorney General will also have against the Receiver's efforts. Thus, the Proposed Settlement does not put the Attorney General in any worse position than the position he currently occupies.

### C. Prospect East Can Suffer No Injury From the Settlement Agreement

Prospect East objects to the provisions of the Settlement Agreement wherein CCCB agrees to allow the Receiver to exercise of control CCCB's exercise of certain rights that CCCB has arising out of its 15% interest in Prospect Chartercare. As discussed below, those provisions are legally enforceable and, therefore, cause Prospect East no legally cognizable injury.

On the other hand, if these Settlement Agreement provisions are unenforceable as Prospect East contends, then, by definition, they will cause Prospect East no legally cognizable injury. Certainly the possibility that Prospect East may have to defend against unenforceable claims does not constitute plain legal prejudice which entitles it to object to the Proposed Settlement. As noted, the likelihood that a settlement will generate a second lawsuit against a non-settling defendant does not confer standing for the non-settling defendant to object to the settlement. Quad/Graphics, Inc. v. Fass, *supra*, 724 F.2d at 1233.

## V. The Receiver May "Lawfully" Accept the Assignment of CCCB's Rights in CC Foundation, and of CCCB's Interests in Prospect Chartercare, Regardless of Whether or Not They Are Ultimately Determined to Be Enforceable

In addition to (incorrectly) claiming that the Proposed Settlement injures them, the Objectors contend it is illegal, and, therefore, the Receiver should not be permitted to pursue it. Thus, CC Foundation asserts the principle that "[a] Rhode Island court should neither endorse, nor enforce, any settlement agreement that violates Rhode Island law." CC Foundation Objection at 3.

The Receiver and his attorneys, as officers of the Court, could not agree more with that principle. However, it does not prohibit the Receiver from asserting uncertain or disputed claims that may ultimately be determined to be unmeritorious, or from taking an assignment from a debtor in connection with a settlement of the claims of the Receivership Estate that is later determined to be unenforceable. Calling such action "illegal" and prohibiting the Receiver from engaging in it would cripple the Receiver's ability to maximize the interests of the Receivership Estate, and impose restrictions that exist for no other litigant. In other words, there is a great deal of difference between an "illegal" settlement, and a settlement in which the Receiver obtains assignments of claims which may or may not be meritorious, or where there is a dispute as to whether the claims are assignable.

As already noted, the Receiver has the right and duty to attempt to maximize the assets of the Receivership Estate. That entitles the Receiver, under appropriate instruction from the Court, to assert disputed or uncertain claims. Indeed, this is precisely what the Court has permitted the Receiver to do in commencing and prosecuting the Federal Court Action and the State Court Action, and in intervening in

the 2015 *Cy Pres* Proceeding. The Defendants in those actions are vigorously defending themselves and seeking outright dismissal of those claims, but that does not make the Receiver's assertion of those claims "unlawful," even if Defendants were to prevail. Of course, the Receiver must proceed in good faith and in compliance with the dictates of Rule 11, just as any other litigant, but the Receiver also has the same rights as any other litigant to assert uncertain or disputed claims, and is not required to attempt to maximize the assets of the Receivership Estate with one hand tied behind his back.

Those same standards apply to disputed or uncertain claims that the Receiver obtains in settlement of the claims of the Receivership Estate. The "legality" of the Receiver's assertion of disputed or uncertain claims should not and does not turn on whether those claims were originally the property of the Receivership Estate (such as the claims the Receiver is asserting in the Federal Court Action), or were obtained by the Receiver as consideration for the settlement of the Receivership Estate's claims against debtors of the Receivership Estate. In other words, just as the Receiver is entitled to assert uncertain or disputed claims that are the original property of the Receivership Estate, so too he is entitled to assert uncertain or disputed claims assigned in settlement of claims of the Receivership Estate.

Similarly, there is nothing unlawful in the Receiver's taking an assignment of an interest that ultimately may be determined to be non-assignable, such that the assignment cannot be enforced. It surely would be ludicrous, and severely cripple and undermine his ability to maximize the assets of the Receivership Estate, to prohibit the Receiver from taking assignments of claims against third parties unless the rights of assignment were ironclad, and the assigned claims were determined to be 100%

meritorious, all in advance of the assignment (and, of course, the assertion of the assigned claim)! As a practical matter, that would prohibit a receiver from taking assignments in connection with settlements, because there is no sure thing in litigation. Even if it did not constitute an absolute prohibition, such a rule would greatly interfere with receivership proceedings. For example, such a limitation would cause parties against whom a receiver may assert assigned claims to flood the receivership proceedings for rulings heading off the receiver, seeking a free bite at the apple in that context, and then a second bite by opposing the claim when it is asserted by the Receiver.

Thus, the possibility (which the Receiver does not concede) that CCCB's interests as sole member in CC Foundation, or CCCB's 15% interest in Prospect Chartercare, may ultimately be determined to be non-assignable, does not preclude the Receiver from taking those assignments and litigating their enforceability. That is not what is intended by the principle that "[a] Rhode Island court should neither endorse, nor enforce, any settlement agreement that violates Rhode Island law."

The cases that CC Foundation cites to the effect that a court will not approve an "unlawful settlement" are not to the contrary. Indeed, the only Rhode Island case cited did not even involve a court approval of a settlement, but, rather, a post-settlement attempt to enforce the agreement, in which the Court (not surprisingly) held that settlements entered into in contravention to a statute are void and, therefore, unenforceable. Power v. City of Providence, 582 A.2d 895, 900 (R.I. 1990) ("We rule today that to the extent that Power claims any rights under the settlement agreement, the settlement agreement is void because it directly conflicts with the act."). If CCCB's assignment is unenforceable, as CC Foundation contends, CC Foundation may assert

that defense when the Receiver seeks to enforce the assignment. However, CC Foundation is not entitled to have that issued determined in advance, in connection with the Receiver's Petition for Settlement Instructions.

The second case CC Foundation cites[9] merely includes the statement that "courts will not approve settlement agreements that are 'illegal, a product of collusion, or against the public interest.'" In order for the Settling Parties to obtain the benefits of R.I. Gen. Laws § 23-17.14-35, the Federal Court will have to be satisfied that this is a "good faith settlement," which the statute defines as "one that does not exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s), irrespective of the settling or non-settling tortfeasors' proportionate share of liability."

The third case CC Foundation cites, In re Capmark Fin. Grp. Inc., 438 B.R. 471 (Bankr. D. Del. 2010), dealt with a proposed settlement of the claims of secured creditors *against the bankruptcy estate*, to which the unsecured creditors objected on the grounds that the trustee lacked authority under Bankruptcy Code to enter into a settlement in which the trustee paid a pre-petition secured claim. After stating that "the Court may not approve a settlement that would violate applicable law," the court found that the trustee had such authority and therefore the settlement was lawful. In re Capmark Fin. Grp. Inc., *supra*, 438 B.R. at 476 ("The Court disagrees with the Official Committee's assertion that there is no basis in the law to allow for the payment through a settlement and outside of a plan of reorganization of a secured creditor's pre-petition claim. There is ample authority under the Bankruptcy Code for such payment."). No

[9] In re Health Diagnostic Laboratory, Inc., 588 B.R. 154, 162 (Bankr. E.D. Va. 2018)

such issues are presented here concerning whether the Receiver has power to settle the claims involved in the Proposed Settlement.

The fourth (and final) case cited by CC Foundation, In re Telcar Grp., Inc., 363 B.R. 345 (Bankr. E.D.N.Y. 2007), involved a settlement in which the bankruptcy trustee agreed to share the bankruptcy estate's recovery on a contingent claim with a fact witness whose testimony would be necessary to prove the claim. The court rejected the settlement on the grounds that it was an agreement to pay for favorable testimony, which would be a crime. In re Telcar Grp, Inc., *supra*, 363 B.R. at 357 ("Here, by reason of the reimbursement and release provisions of the Amended Settlement, Mignone has been offered something of value which, on its face, appears to be in violation of 18 U.S.C. § 201, *et. seq.* since that statute criminalizes the giving of something of value for or because of past or potential testimony before a Court."). There is no even colorable argument that the Proposed Settlement is criminal.

Although Prospect East also makes the argument that the Proposed Settlement "violates Rhode Island law," Prospect East cites no authority for that claim, other than "[t]he Court should deny the Settlement Petition and reject the Settlement Agreement because it violates the Settlement Statute as it plainly evidences collusion among the Receiver, Special Counsel, and the Settling Parties." Prospect East Memo. at 8 (quoting a portion of R.I. Gen. Laws § 23-17.14-35).

Prospect East apparently does not understand R.I. Gen. Laws § 23-17.14-35. That statute provides a benefit to the Receivership Estate if a "good-faith settlement" is proven, by eliminating the non-settling Defendants' rights to a settlement credit based on the Settling Defendants' proportionate fault, and provides a benefit to the Settling Defendants by eliminating their liability for contribution. See Gray v. Derderian, No. 03-

483L, 2009 WL 1575189 (D.R.I. June 4, 2009) (Lagueux, J.) ("Such a finding is necessary to extinguish all potential contribution claims by joint tortfeasors against the Movants once the requisite releases have been executed.") (referring to R.I. Gen. Laws § 42-116-40 (the DEPCO statute), upon which R.I. Gen. Laws § 23-17.14-35 is patterned).

The consequence if a settlement does not comply with the requirements of R.I. Gen. Laws § 23-17.14-35 is that these benefits are unavailable, not that settlements which fail to comply with those requirements are prohibited or unenforceable. Insofar as Prospect East is truly asking the Court to determine whether the Proposed Settlement meets those standards, that inquiry is premature. The Receiver is merely asking the Court for authority to seek settlement approval from the Federal Court, which will be asked to approve the Proposed Settlement as a good-faith settlement under R.I. Gen. Laws § 23-17.14-35. The Receiver is *not* asking the Court to determine whether the Proposed Settlement is entitled to the benefits afforded by R.I. Gen. Laws § 23-17.14-35.

If, however, Prospect East is asserting "collusion" as a basis to deny the Petition for Settlement Instructions, independent of R.I. Gen. Laws § 23-17.14-35, that would be a perfectly appropriate argument except it has absolutely no basis in fact. Prospect East makes the following claim:

> Unambiguously, the Settlement Agreement plainly evidences the Settling Parties' complicit capitulation to its provisions. Such collusion is evident in the Settling Parties' admission of liability, their admission of causing "at least" $125,000,000 in damages, and allowing the Receiver to oversee and conduct the Settling Parties' dissolution and liquidation. The Settling Parties' yielding to the Receiver and Special Counsel's demands can be nothing more than the Receiver, Special Counsel, and Settling Parties acting in cohort to the detriment of other litigants in the Federal Action, the exact actions that the Settlement Statute was enacted to prevent. The

> collusion among the Settling Parties, the Receiver, and Special Counsel is plainly evident in several paragraphs of the Settlement Agreement.

Prospect East Memo. at 8-9. The "Settling Parties" to the Settlement Agreement are the Receiver and the Settling Defendants. Presumably, when Prospect East refers to the Settling Parties, it is referring to the Settling Defendants, since all of the Settlement Agreement provisions to which it refers ("the Settling Parties' admission of liability, their admission of causing 'at least' $125,000,000 in damages, and allowing the Receiver to oversee and conduct the Settling Parties' dissolution and liquidation") are concessions that the Receiver extracted from the Settling Defendants.

That correction only leads to the real problem with this argument, which is that all of the provisions to which Prospect East objects as evidence of "collusion" are benefits to the Receivership Estate. "Collusion" in the context of the Petition for Settlement Instructions can only mean that the Receiver and the Settling Parties have secretly agreed to a result which disadvantages the Plan participants, which, for example, can occur when named class representatives or class counsel agree with a defendant to a settlement that disadvantages all or some of the absent members of the class:

> In class actions, for example, "[a]lthough the court gives regard to what is otherwise a private consensual agreement between the parties, the court must also evaluate the proposed settlement agreement with the purpose of protecting the rights of the absent class members who will be bound by the settlement. The court must therefore scrutinize the proposed settlement agreement to the extent necessary to 'reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' "

Robbins v. Alibrandi, 25 Cal.Rptr.3d 387, 394 (Cal. App. 2005) (citations omitted). Here, Prospect East is objecting that the Proposed Settlement is too beneficial to the Receiver, and the product of "capitulation" by the Settling Defendants. None of the Plan participants would object, however, that the settlement which the Receiver negotiated is

too favorable to them. Moreover, by definition, all settlements constitute "capitulation" by at least one of the settling parties.

What Prospect East's "collusion" argument boils down to is that the Receiver was too aggressive, and should have left potentially obtainable assets on the settlement table, or the Settling Defendants were too submissive, and should have refused to settle if the Receiver required these assignments as a condition for settling. That is not the law. To the contrary, not only does the Receiver have the right to drive the hardest bargain he can, he "must 'endeavor to realize the largest possible amount for assets of the estate.'" Golden Pacific Bancorp. v. F.D.I.C., 375 F.3d 196, 201 (2d Cir. 2004) (quoting Phelan v. Middle States Oil Corp., 154 F.2d 978, 991 (2d Cir. 1946)).

## VI. Prospect East's Objections are Meritless

### A. The Receiver Is Entitled to Obtain CCCB's Interest in Prospect Chartercare

#### 1. The Proposed Settlement Does Not Transfer Rights in Violation of the LLC Agreement

Prospect East has objected to the Proposed Settlement on the grounds that it violates the anti-transfer provisions in the Prospect CharterCare Limited Liability Agreement ("LLC Agreement") between and among CCCB, Prospect East, and Prospect Chartercare.

Of course, the Receiver is not a party to the LLC Agreement. It certainly could be argued that it is irrelevant in the Receivership Proceedings whether the Proposed Settlement constitutes a breach of contract between the Settling Defendants and third parties. The Court need not reach that conclusion, however, because it is clear as a

matter of law that the provisions of the Settlement Agreement to which Prospect East objects do not violate the LLC Agreement.

The relevant provisions of the Settlement Agreement and the language of the LLC Agreement must both be addressed for the merits of that argument to be considered by the Court.

Prospect East objects to the provisions of the Settlement Agreement that give the Receiver any rights with respect to CCCB's interests in Prospect Chartercare, including especially CCCB's 15% membership interest. Those provisions consist of a definition and certain substantive terms. The definition is as follows:

> d. "CCCB's Hospital Interests" means all of the claims, rights and interests against or in Prospect CharterCare, LLC that CCCB received in connection with the LLC Agreement or subsequently obtained, including but not limited to the 15% membership interest in Prospect CharterCare LLC, and any rights or interests that SJHSRI or RWH may have in connection therewith.

Settlement Agreement ¶ 1(d).

The substantive terms to which Prospect East objects state as follows:

> 17. The Settling Defendants warrant and represent that, to their knowledge, CCCB's Hospital Interests stand solely in the name of CCCB, that CCCB has not participated in the amendment or revision of the LLC Agreement from its original terms, and that CCCB has not assigned, transferred, or otherwise limited or encumbered such rights or interests, and that following the execution of the Settlement Agreement, CCCB will not assign, transfer, or otherwise limit or encumber such rights or interests except with the express written consent of the Receiver. The Settling Defendants agree to hold the CCCB Hospital Interests in trust for the Receiver, and that the Receiver will have the full beneficial interests therein.
>
> 18. At the written direction of the Receiver addressed to Counsel for the Settling Defendants at any time the Receiver may choose, provided it is more than five (5) business days after the Effective Date, the Settling Defendants agree that CCCB will exercise the put option referred to in the LLC Agreement as the "CCHP Put Option," (the "Put Option") in accordance with the terms of the LLC Agreement

pertaining to said exercise, or as the Receiver may otherwise direct, at such time as the Receiver may elect, and that the Receiver shall participate with CCCB in all matters concerning the exercise of the Put Option, and that the Settling Defendants shall promptly take all steps reasonably requested by the Receiver in connection therewith, and transfer to the Receiver any payment to or on behalf of CCCB for all or any part of the CCCB Hospital Interests, to be disposed of by the Receiver for the benefit of the Plan in accordance with the orders of the court in the Receivership Proceeding, as set forth in paragraph 33 of this Settlement Agreement.

19. The Settling Defendants agree that, in the event that the Receiver decides that CCCB should not exercise the Put Option, or if CCCB attempts to exercise the Put Option but the attempt is rejected, or in the judgment of the Receiver the result of that attempted exercise is not wholly successful, the Receiver may sue in the name of CCCB to collect or otherwise obtain the value of such beneficial interests, and to cooperate in any litigation commenced by the Receiver and to comply with all of the Receiver's reasonable requests to maximize and realize the full value of CCCB's Hospital Interests, subject to any orders of the court in the Liquidation Proceedings concerning CCCB's responsibilities, to be paid to and distributed by the Receiver for the benefit of the Plan in accordance with the orders of the court in the Receivership Proceedings, as set forth in paragraph 33 of this Settlement Agreement.

20. In the event that the Settling Parties are still seeking the Order Granting Final Settlement Approval on June 20, 2019, the Settling Defendants agree to exercise the Put Option upon the request of the Receiver and at such time as the Receiver may select, provided the Settling Defendants shall have no such obligation if the Receiver makes the request after the Court has refused to grant final settlement approval.

* * *

29. In connection with the execution of this Settlement Agreement, the Settling Defendants and the Receiver will execute a security agreement granting to the Receiver a security interest (the "Receiver's Security Interest") in all of their accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-or-credit rights, letters of credit, money, and general intangibles (the "Security Agreement") and the UCC-1 Financing Statement attached hereto as Exhibits 19 & 20, respectively, and such other documents as the Settling Parties agree are reasonably necessary to effectuate and perfect the Receiver's Security Interest, to secure the payment of the Initial

> Lump Sum and the obligations of the Settling Defendants under paragraphs 12, 13, 15, 18, 19, 20, 21, and 26 of this Settlement Agreement.

Settlement Agreement ¶¶ 17-20, 29. Moreover, Prospect East objects to the fact that the UCC-1 Financing Statement referred to in paragraph 29 has actually been filed with the Rhode Island Secretary of State.

Prospect East asserts that the above-quoted provisions of the Settlement Agreement violate Section 13.1 of the LLC Agreement, which states in pertinent part as follows:

> 13.1 Transfers by Members. **Except as otherwise set forth in this Article XIII**, a Member may not sell, assign (by operation of Law or otherwise), transfer, pledge or hypothecate ("Transfer") all or any part of its interest in the Company (either directly or indirectly through the transfer of the power to control, or to direct or cause the direction of the management and policies of; such Member).

LLC Agreement Article XIII, Section 13.1 (emphasis supplied).

The Receiver concedes, for purposes only of the Petition for Settlement Instructions, that the paragraphs of the Settlement Agreement to which Prospect East objects, taken collectively, might be argued to violate this provision of the LLC Agreement *unless* they were allowed "as otherwise set forth in Article XIII." However, the Receiver makes that concession because it is clear as a matter of law that the paragraphs of the Settlement Agreement to which Prospect East objects are expressly permitted in Article XIII of the LLC Agreement, which permit transfers to "affiliates" or "successors" of CCCB, because the Receiver and the Plan come within the definitions set forth in the LLC Agreement for "affiliates" and "successors" of CCCB.

Section 13.2(a)(ii) of Article XIII of the LLC Agreement permits transfers to affiliates:

> 13.2 Permitted Transfers.
>
> (a) Notwithstanding the restriction in Section 13.1, the following Transfers are permitted and shall not be deemed to violate the restrictions contained in Section 13.1:
>
> * * *
>
> (ii) Transfers by a Member to one or more of its Affiliates, or a Transfer by CCHP to CharterCARE Health Partners Foundation (f/k/a St. Joseph Health Services Foundation), any such transferee automatically becoming a Substituted Member;

LLC Agreement Article XIII, Section 13.2(a)(ii). The capitalized word "Affiliate" is a defined term, as follows:

> 1.4 "Affiliate" means, as to the Person in question, any Person that directly or indirectly controls, is controlled by, or is under common control with, the Person in question and successors or assigns of such Person; and the term "control" means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person whether through ownership of voting securities, by appointment of trustees, directors, and/or officers, by contract or otherwise.

LLC Agreement Article I, Section 1.4.

The determination whether the Receiver and/or the Plan are an "Affiliate" also depends on the definition of the capitalized word "Person", which the LLC Agreement defines as follows:

> 1.30 "Person" means any individual, partnership, corporation, trust, limited liability company or other entity.

LLC Agreement Article I, Section 1.30.

Applying these defined terms, the Plan is an "Affiliate" of CCCB because CCCB indirectly controlled SJHSRI, which, in turn, directly controlled the Plan, and because the Plan is a "Person" under the contractual definition that an "entity" is a "Person."

Hence, the Plan is a "Person," who "is [indirectly] controlled by" CCCB, and, therefore, the Plan is an "affiliate" of CCCB under the LLC Agreement's definition of "Affiliate."[10]

The transfers from CCCB to the Receiver to which Prospect East objects are transfers to the Plan. Accordingly, the transfers in the Settlement Agreement of certain of CCCB's rights with respect to its 15% interest in Prospect Chartercare are transfers to an "Affiliate" and, therefore, are "Permitted Transfers' under Article XIII of the LLC Agreement.

This analysis not only is indisputable based on the contract language, it also makes perfect sense and is consistent with the overall intent of the parties to the LLC Agreement that CCCB, if it wished, would be able to transfer its 15% interest to any entity which it indirectly or directly controlled. Moreover, the LLC Agreement was reviewed and approved by both the Attorney General and the Department of Health in connection with their approval of the Conversion, who thereby approved CCCB having the right to transfer its interests to an "Affiliate" as defined in the LLC Agreement.

We need not go further, having already demonstrated that the transfers in the Settlement Agreement to which Prospect East objects are "Permitted Transfers" under Article XIII of the LLC Agreement. However, the fact that the Plan is an "Affiliate" of

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[10] In addition, the Order Appointing Permanent Receiver (entered October 27, 2017) expressly provides:

> 3. **The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the Respondent's plan administrator, officers, directors and managers under** applicable state and federal law, the Plan, as amended, the Trust Agreement, as may have been amended **and/or other agreements** in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of RI Rules of Civil Procedure, Rule 66.
>
> [Emphasis supplied]

Thus the rights to receive any transfers under Article XIII of the LLC Agreement were not severed by virtue of SJHSRI's petitioning the Plan into receivership in August 2017.

CCCB is not the only reason the Settlement Agreement does not violate the LLC Agreement. The Receiver is also an "affiliate" of CCCB, to whom CCCB's interests in Prospect Chartercare may be transferred pursuant to Article XIII of the LLC Agreement.

The Receiver is an "affiliate" of CCCB for three reasons. The first reason is that the Receiver is the legal representative of the Plan. See Chitex Communication, Inc. v. Kramer, 168 B.R. 587, 590 (S.D. Tex. 1994) (receiver for insolvent corporation has full rights of corporation); Haas v. Sinaloa Explor. & Dev. Co., 152 A. 216, 219 (Del.Ch. 1930) ("receiver stands in the shoes of the debtor"); AG Route Seven Partnership v. U.S., 57 Fed.Cl. 521, 534 (Ct Cl. 2003) ("Here, the FDIC is present as such legal representative of the corporate entity, to wit, as receiver, and has alleged all claims that it perceives the entity can successfully pursue."). Insofar as the Plan is entitled to receive CCCB's 15% interest in Prospect Chartercare as an "affiliate" of CCCB, then the Receiver in his capacity as legal representative of the Plan is entitled to receive CCCB's 15% interest in Prospect Chartercare on behalf of the Plan.

The second reason the Receiver is an "Affiliate' to whom CCCB may transfer its 15% interest is because, under the terms of the LLC Agreement, the "successor" of an "Affiliate" is thereby also an "Affiliate." Under the LLC Agreement, the term "Affiliate" includes the "successors or assigns of" an "Affiliate." LLC Agreement Article I, Section 1.4. As court-appointed Receiver, and as the current Administrator of the Plan, the Receiver is the "successor" Administrator of the Plan, and specifically the "successor" to SJHSRI, who, until the Receivership Proceedings, completely controlled and was the Administrator of the Plan.

Indeed, the Order appointing the Receiver expressly states that "[t]he Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the

**Respondent's plan administrator**"[11] (emphasis supplied). Accordingly, the Receiver is an "Affiliate" of CCCB under the definition set forth in the LLC Agreement. That also makes complete sense, even though CCCB does not directly or indirectly control the Receiver, because "successors" typically are not controlled by their predecessors.

Because the term "successor" is not defined in the LLC Agreement, it should be given its plain and ordinary meaning. See Terrien v. Zwit, 648 N.W.2d 602, 613 (Mich. 2002) ("As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous. Rather, if a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.'") (quoting Henderson v. State Farm Fire & Casualty Co., 460 Mich. 348, 354, 596 N.W.2d 190 (1999)) (additional citation omitted); American Family Life Assur. Co. of Columbus v. Intervoice, Inc., 659 F. Supp. 2d 1271, 1276 (M.D. Ga. 2009) ("Undefined terms in a contract 'are to be given their ordinary and generally accepted meaning unless the [contract] shows that the words were meant in a technical or different sense.'"); Jack v. Paul Revere Life Ins. Co., 982 P.2d 1228, 1234 (Wash. App. 1999) ("Washington law requires us to enforce unambiguous terms in an insurance policy. In so doing, we view the contract in its entirety and read the policy's terms as an average insured would, giving undefined terms their 'ordinary and common meaning.'").

The common meaning of "successor" would include the Receiver.

> Generally, a successor is "[a] person who succeeds to the office, rights, responsibilities, or place of another." Black's Law Dictionary (9th ed. 2009). The word successor can mean one who is entitled to succeed, or it can mean one who has in fact succeeded.

[11] See n.10, *supra*.

Holly Woods Ass'n of Residence Owners v. Hiller, 708 S.E.2d 787, 796 (S.C. App. 2011). A receiver by definition is a "legal successor" of the entity in receivership. See U.S. Fire Ins. Co. v. Moseley, 551 S.W.2d 429, 431 (Tex. App. 1976) ("[The] Receiver is a successor of the Debtor for many purposes."); Husers v. Papania, 22 So.2d 755 (La. App. 1942) ("The expression in defining a person in the above section [as] including the successor or representative of an individual, corporation, partnership, association or other organized group, evidently means the **legal successor or representative of these, such as a receiver**, liquidator, executor, administrator, guardian or tutor.") (emphasis supplied).

The third reason the Receiver is an "Affiliate" to whom CCCB could transfer its rights in the 15% interest is, as noted *supra* at n.10, the Order Appointing Permanent Receiver expressly provided: "The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the Respondent's plan administrator, officers, directors and managers under . . . **other agreements** . . . ." Order Appointing Permanent Receiver ¶ 3 (emphasis added). Thus the Receiver possesses all the contract rights SJHSRI (*i.e.* the Plan's administrator) had under the LLC Agreement, including the right to receive transfer of CCCB's 15% interest in Prospect Chartercare as an "Affiliate" of CCCB.

Accordingly, the terms of the Settlement Agreement to which Prospect East objects do not in fact violate the LLC Agreement, for at least four reasons: 1) because the Plan is an "Affiliate" of CCCB, 2) because the Receiver is also an "Affiliate" of CCCB since the Receiver is the legal representative of the Plan, 3) because the Receiver himself as successor administrator to the Plan is the successor to SJHSRI and therefore also an "Affiliate" of CCCB, and 4) because the order appointing the Receiver

gave him SJHSRI's rights under the LLC Agreement to be transferred CCCB's interests (including its 15% membership interest) as an "Affiliate" of CCCB.

Prospect East complains especially that the UCC-1s filed to perfect the Receiver's security interests in the Proposed Settlement violate the anti-transfer provisions of the Plan because they constitute a prohibited "hypothecation." However, the Receiver and the Plan are "Affiliates" for the reasons previously discussed. The LLC Agreement expressly defines "Transfer" to include hypothecations,[12] and permits transfers between affiliates. Hypothecations between affiliates are permitted because hypothecations are a form of transfer, and transfers between affiliates are permitted. Accordingly, the UCC-1s filed by CCCB with the Rhode Island Secretary of State did not violate the LLC Agreement.

**2. The Restrictions on Transfer in the LLC Agreement are Void**

"It is well established that '[f]raud vitiates all contracts.' " West Davisville Realty Co., LLC v. Alpha Nutrition, Inc., 182 A.3d 46, 51 (R.I. 2018) (quoting Guzman v. Jan–Pro Cleaning Systems, Inc., 839 A.2d 504, 507 (R.I. 2003)). The Receiver's Complaint in the Federal Court Action[13] alleges as follows:

> d. Beginning in 2011, SJHSRI and other Defendants put into operation a scheme to transfer SJHSRI's operating assets, cash, and most of its expected future charitable income to entities controlled by SJHSRI's parent company, intending that such assets thereby would be out of reach of a suit by the Plan participants, and then terminate the Plan. This scheme had four key stages:

[12] See LLC Agreement Article XIII, Section 13.1 ("Transfers by Members. Except as otherwise set forth in this Article XIII, a Member may not sell, assign (by operation of Law or otherwise), transfer, pledge or **hypothecate** ("Transfer")…") (emphasis supplied).

[13] And in the stayed State Court Action.

> i. First, in connection with the 2014 Asset Sale, SJHSRI and related entities engaged in the fraudulent transfer of SJHSRI's operating assets to the control of a for-profit limited liability company, leaving SJHSRI with the insolvent pension plan and no operating assets, in return for SJHSRI's parent company getting a 15% stake in the for-profit company that they thought would be safe from the claims of Plan participants, and made fraudulent misstatements and material omissions concerning the Plan to the state regulatory agencies whose approval was required for the transfer to go forward.

Complaint ¶ 57(d)(i). The Complaint then extensively describes the fraud, as follows:

> 419. The consideration that Prospect East provided at the closing on or about June 20, 2014 included 15% of the shares of Prospect Chartercare.
>
> 420. The fair market value of that 15% at the time of the asset sale was at least $6,640,000 according to Prospect Chartercare's own audited financials.
>
> 421. The Asset Purchase Agreement had provided that CCCB would receive those shares, as follows:
>
> > Sellers have designated CCHP (the "Seller Member") to be the holder of the units representing the Company's limited liability company memberships on behalf of all Sellers to be issued as partial consideration in respect of the sale by Sellers of the Purchased Assets.
>
> 422. The consideration that the Prospect Entities provided in return for the assets included the undertaking to provide long term working capital of $50,000,000, which conferred a benefit on CCCB as 15% shareholder in the additional amount of $9,479,000, according to Prospect Chartercare's own audited financials.
>
> 423. Thus, notwithstanding that CCCB provided virtually none of the consideration for the transaction, the parties consummated the transaction so that CCCB obtained all of the 15% interest in Prospect Chartercare, totaling a fair market value of at least $15,919,000. SJHSRI and RWH received none of that interest, and, therefore, that valuable asset was not available to satisfy claims of Plan participants, the Plan, or any other creditors of SJHSRI.

Complaint ¶¶ 418-423. Insofar as the Receiver prevails on these claims, any restrictions on transfer of CCCB's 15% interest that are set forth in the LLC Agreement

would be void and unenforceable, both as the product of fraud, and because they themselves are part of the fraud of keeping this 15% interest from the creditors of SJHSRI, including the Plan participants. Indeed, Prospect East's current efforts to use the LLC Agreement to prevent CCCB from transferring its interests to the Receiver are an effort to use contract terms to protect fraud.

We do not expect the Court to adjudicate these issues in connection with the Receiver's Petition for Settlement Instructions. Instead, we offer them as further justification for the Court *not* inquiring into the merits concerning the validity of the provisions in the Settlement Agreement which Prospect East claims are either illegal or impair contract rights. See Campbell Investors v. TPSS Acquisition Corp., supra, 787 N.E.2d at 82 (refusing to prohibit the receiver from taking an assignment of claims, because "the subject of the assignment agreement, including the promissory note, is extensively intertwined with the allegedly fraudulent conveyances and conversion that the receiver has asserted" against the target of the assigned claims). To do so would turn these proceedings into a full-blown trial on the merits, and discourage settlements that in general are favored by the courts. Prospect East and the other objectors will suffer no prejudice if those issues are left for another day, such as when, for example, the Receiver attempts to enforce these provisions, because until then they have not been injured, and at such time their arguments can be fully heard.

### B. Prospect East's Other Objections Are Also Meritless

#### 1. There Is Nothing Objectionable about the Settling Defendants' Agreeing to Undergo a Judicially Supervised Liquidation

Prospect East contends—without any authority whatsoever—that it is inappropriate for the Settling Defendants to agree to undergo a judicially supervised

liquidation in the event the Proposed Settlement is approved. See Prospect East's Memo. at 9. The Receiver hopes to obtain additional recoveries in those judicial liquidations, in which the Receiver will assert the Receivership Estate's claims against the remaining assets of the Settling Defendants which are not presently available to be paid in settlement. Far from evincing bad faith or an overstepping of his authority, however, the fact that the Receiver has been able to require that they submit to judicial liquidation is actually evidence of the strength of the legal claims the Receiver has brought against the Settling Defendants and the vigor with which he is pursuing the Court's mandate to maximize the value of the Receivership Estate.

**2. There Is Nothing Objectionable about the Settling Defendants' Agreeing to Join the Receiver in Seeking Settlement Approval from the Federal Court**

Again without citing any authority, Prospect East contends it is inappropriate for the Settling Defendants to have agreed to seek approval of the Proposed Settlement from the Federal Court. Prospect East's Memo. at 10. Of course, inasmuch as the settlement is a settlement of claims brought as a class action, such claims can only be settled with the approval of the Federal Court where that class action is pending. See Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."). That is clearly in the Settling Defendants' interests, since federal court approval is the only way that the Settling Defendants can bind the over 2,700 Plan participants who are not named Plaintiffs to the settlement.

### 3. There Is Nothing Objectionable about the Settling Defendants' Acknowledgment That the Plaintiffs' Damages Are Large and That Their Proportionate Fault Is Small

Again without any citing any authority, Prospect East contends that the Settling Defendants' acknowledgment in the Settlement Agreement that the Plaintiffs' damages are "at least $125,000,000" is unfairly prejudicial to the non-settling Defendants. Prospect East's Memo. at 10. This contention proceeds on three false premises. First, the acknowledged fact happens to be true, and Prospect East does not even suggest otherwise. Second, the Settling Defendants are entitled to make whatever judicial or evidentiary admissions they wish to make. Prospect East has no more right to object to admissions made in the Settlement Agreement than it would to strike such admissions from the Settling Defendants' Answer to the Complaint. Third, the Receiver is entitled to extract settlement terms from the Settling Defendants that will make it more difficult for the non-settling Defendants to escape liability. The non-settling Defendants are entitled, of course, to deny the amount of damages or, indeed, argue that there are no damages.

Again without citing any authority, Prospect East contends that the Settling Defendants' contention that their proportionate fault is small, as recited in the Settlement Agreement, is itself collusive. See Prospect's Memo. at 10-11. Prospect East again misunderstands the meaning of "collusion" in connection with the Petition for Settlement Instructions. The Receiver is entitled to obtain a strategic advantage from the Settling Defendants to be used against the non-settling Defendants. Similarly, the Settling Defendants are entitled to go on record that they believe their proportionate fault is small, but that they are nevertheless settling because the law of joint and several liability could result in their incurring disproportionate liability to the Receiver. See, e.g.,

Roberts-Robertson v. Lombardi, 598 A.2d 1380, 1281 (R.I. 1981 (*per curium*) ("It is a well-settled doctrine that a plaintiff may recover 100 percent of his or her damages from a joint tortfeasor who has contributed to the injury in any degree.").

**4. There Is Nothing Objectionable about the Settling Defendants' Agreeing Not to Object to the Receiver's Claims in the *Cy Pres* Proceeding**

Finally, Prospect East contends—without any legal support and through an incorrect misreading of the settlement documents—that the Settling Defendants' agreement *not to object* to the Receiver's claims in the *Cy Pres* proceeding is an agreement "to allow the Receiver to direct and control the Settling Parties [*sic recte* Defendants] in the pending Cy Pres Proceeding." Prospect East's Memo. at 11. Their agreement not to object does not confer on the Receiver the right to direct and control the Settling Defendants. Of course the Settling Defendants should and will drop their objections to the Receiver's claims in the 2015 Cy Pres proceeding as part of a complete settlement with the Receiver. The purpose of the Proposed Settlement is to end all litigation between the Receiver and the Settling Defendants.

5. **The Transfer of CCCB's 15% Interest in Prospect Chartercare to the Receiver Would Not Be a "Conversion" Under the HCA**

In its memorandum, Prospect East states that "[t]he Prospect Entities reference and incorporate herein the arguments set forth in the Petition for Declaratory Order." Prospect East Memo. at 12 (referring to Prospect Chartercare's filing with the Attorney General). These arguments include the contention that CCCB's transfer to the Receiver of its 15% membership interest in Prospect Chartercare constitutes a "hospital conversion" under the HCA, which requires prior regulatory approvals. As argued in the Receiver's motion to hold Prospect Chartercare in contempt, filed with this reply

memorandum, Prospect Chartercare's filing of the Petition for Declaratory Order violated the Court's orders and should put Prospect Chartercare in civil contempt. Accordingly, any arguments set forth in the Petition should be completely ignored in connection with the Receiver's Petition for Settlement Instructions. If, however, the Court considers any arguments set forth in the Petition, then the Receiver requests that the Court also consider the Receiver's memorandum in support of his motion to hold Prospect Chartercare in contempt, and the discussion why the proposed transfer does not constitute a "hospital conversion" under the HCA.

## VII. The Receiver Has a Good Faith Basis for Believing That CCCB's Assignment of Its Rights in CC Foundation Will Be Enforceable

### A. CCCB's Claim to Be CC Foundation's Sole Member

It is undisputed that CC Foundation's Articles of Incorporation list CCCB as its sole member. Indeed, CC Foundation's corporate disclosure filed in the Federal Court Action, attached hereto at Tab 2, makes that admission:

> On August 25, 2011, CCF [CC Foundation] filed with the Rhode Island Secretary of State's Office Articles of Amendment to CCF's Articles of Incorporation stating, in relevant part, that CCCB was CCF's sole member. No amendment to that portion of the Articles of Incorporation has been filed.

It is also indisputable as a matter of law that the articles control in the event of any conflict with the by-laws.[14] Nevertheless, at various times in this litigation, CC Foundation has disputed the Receiver's contention that CCCB is the sole member

[14] See R.I. Gen. Laws § 7-6-34(c) ("(c) Unless the articles of incorporation provide that a change in the number of directors be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the bylaws is controlling. In all other cases, whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation is controlling.").

of CC Foundation, on the grounds that CCCB allegedly waived or abandoned its membership in CC Foundation.[15]

However, CC Foundation concedes that dispute is not before the Court in connection with the Petition for Settlement Instructions:

> CCF acknowledges, however, that this receivership action is not the proper forum in which the parties should be litigating the merits of the abandonment issue. CCF intends to litigate that issue in a separate forum.

CC Foundation Objection at 2 n.1. The Attorney General also does not dispute in his memorandum that CCCB is CC Foundation's sole member. Indeed, the Attorney General has already accepted as fact that CCCB is CC Foundation's sole member, as discussed *infra* at 53-54.

Thus, the Receiver clearly has a good faith basis for asserting that CCCB is CC Foundation's sole member.

### B. CCCB's Rights in CC Foundation Are Assignable to the Receiver

#### 1. The Settlement Agreement Provisions

The provisions in the Settlement Agreement concerning CCCB's assignment of its interest in CC Foundation to the Receiver consist of 1) a definition of those interests, 2) the "Consent of CharterCARE Community Board as Sole Member of CharterCARE Foundation," which is Exhibit 12 to the Settlement Agreement and which CCCB is required to execute and deliver to the Receiver prior to the assignment, and 3) the provisions in the Settlement Agreement obligating CCCB to assign its interests after that Consent has become effective.

[15] See Tab 2 ("CCF contends, however, that it has functioned independently of CCCB for the last three-to-four years. CCF further contends that, well before this action was filed, CCCB's legal rights as CCF's sole member effectively terminated due to waiver and/or abandonment.).

The definition is as follows:

> c. "CCCB's Foundation Interests" means all of the claims, rights and interests of CCCB against or in CharterCARE Foundation (f/k/a CharterCARE Health Partners Foundation (f/k/a St. Josephs Health Services Foundation")), including but not limited to the right to recover funds transferred to CharterCARE Foundation in connection with the 2015 *Cy Pres* Proceeding, and any rights and interests appurtenant to CCCB's present or former status as a member or sole member of CharterCARE Foundation.

Settlement Agreement ¶ 1(c).

The substantive provisions to which CC Foundation objects are as follows:

> 12. Within five (5) business days after the Effective Date, the Settling Defendants agree to deliver to Plaintiffs' Counsel a document evidencing consent by CCCB as sole member of CharterCARE Foundation (CCCB's Consent as Sole Member") pursuant to R.I. Gen. Laws § 7-6-104, in the form attached hereto as Exhibit 12.
>
> 13. Within ten (10) business days after the Effective Date, the Settling Defendants agree to deliver to Plaintiff's Counsel an irrevocable assignment (the "Irrevocable Assignment") to the Receiver of all of CCCB's Foundation Interests, effective ten (10) days thereafter, and, upon written request of the Receiver, to promptly give CharterCARE Foundation written notice of said Irrevocable Assignment by certified mail to CharterCARE Foundation c/o Paula Iacono, 7 Waterman Avenue, North Providence RI, or such other person who becomes CharterCARE Foundation's registered agent, and to counsel for CharterCARE Foundation in the Federal Court Action, with copy to Plaintiffs' Counsel. The Settling Defendants further agree to thereafter assist the Receiver's efforts to confirm and enforce the Irrevocable Assignment and CCCB's Consent as Sole Member.
>
> 14. The Settling Defendants warrant and represent that, to their knowledge, CCCB has not participated in amending the articles of incorporation or by-laws of CharterCARE Foundation to change CCCB's status as sole member of CharterCARE Foundation or otherwise eliminate or diminish CCCB's Foundation Interests, that the Settling Defendants have no knowledge of such amendment, and that CCCB will not participate in such amendment, or assign, transfer, or otherwise limit or encumber CCCB's Foundation Interests, except as provided in paragraph 13 of this Settlement Agreement.

Settlement Agreement ¶¶ 12-14.

The "Consent of CharterCARE Community Board as Sole Member of CharterCARE Foundation" states in pertinent part[16] as follows:

> The undersigned CharterCARE Community Board ("CCCB"), in its capacity as sole member of CharterCARE Foundation ("CCF"), approves, authorizes and consents to the following actions, pursuant to CCCB's inherent powers and R.I. Gen. Laws § 7-6-104:
>
> * * * *
>
> 2. CCCB hereby authorizes and approves amendment of the by-laws of CCF, effective immediately, by re-adopting[17] the by-laws of CCF in the form amended as of October 8, 2013 (attached hereto as Exhibit A), with the following modifications:
>
> (a) deleting the last three sentences of Section 2.01 in their entirety, and substituting the following:
>
> > CharterCARE Community Board's membership in CharterCare Foundation may be assigned to Attorney Stephen Del Sesto in his capacity as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan.
>
> * * * *

Settlement Agreement Exhibit 12.

### 2. The Enforceability of Those Provisions

CC Foundation contends that the assignment is "unenforceable," not under the law of contracts or corporations, but because CC Foundation predicts that the Receiver

[16] The Receiver here quotes only those sections dealing with CCCB's right to assign to the Receiver its interest in CC Foundation.

[17] These by-laws were "re-adopted" in an excess of caution to avoid even having to address the patently meritless argument that the by-laws that were later adopted without authority of CCCB somehow had any validity.

will use the power he obtains from the assignment to secure CC Foundation's "charitable trust assets in order to use them for the private benefit of Plan participants." CC Foundation Objection at 14. CC Foundation has no right to even be heard if, in fact, its current alleged board of directors are usurpers. Moreover, although that is indeed the Receiver's ultimate goal, the Receiver most assuredly will act within the law in attempting to achieve that goal, including commencement of proceedings for judicial liquidation and possibly the filing of a usurpation action against the current purported board of directors of CC Foundation. See, e.g., Dillon v. Scotten, Dillon Co., 335 F. Supp. 566 (D. Del. 1971) (declaratory judgment action to declare that current board members were unlawfully elected and must be replaced by lawfully elected directors).

However, the Receiver is a long way from taking any action whatsoever with respect to the charitable assets of CC Foundation. As discussed below, that will likely occur through judicial liquidation proceedings, at which the objections of the Attorney General and the current individuals purporting to act on behalf of CC Foundation will be heard. This is neither the time nor the occasion to finally determine whether the Receiver has the right to control those assets, or how that control may be lawfully exercised. In any event, the argument that an assignment is unenforceable cannot be predicated on the presumption that a beneficiary of the settlement will use it to violate the law, especially when that person is an officer of the Court.

As the sole member of CC Foundation, the Receiver will be entitled to exercise those rights and powers given the member under the by-laws, including the following:

> SECTION 2.02. Enumerated Powers. The powers of the Members shall be limited to taking action on the activities enumerated below and those activities expressly requiring action of the Members pursuant to law or the Articles of Incorporation:
>
> * * * *

> (g) authorization or approval of any plan of dissolution, liquidation, assignment for the benefit of creditors, petition for voluntary bankruptcy or appointment, of a receiver, or any plan for winding up the affairs of the Foundation, or any liquidating distribution by the Foundation;
>
> * * * *

Tab 2 at 2-3.

These powers will give the Receiver lawful rights over the charitable assets of CC Foundation. The Receiver may invoke his power under Section 2.02(g) of the by-laws, and seek a judicial dissolution of CC Foundation, pursuant to R.I. Gen. Laws § 7-6-61(c)(1):

> (c) The assets of the corporation or the proceeds resulting from a sale, conveyance, or other disposition of the assets shall be applied and distributed as follows:
>
> > (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;

In that liquidation proceeding, the Receiver can assert his claims as a creditor of CC Foundation, and ask the Court to order that all of CC Foundation's assets be paid to the Plan as "liabilities and obligations of the corporation." If the individuals currently purporting to act on behalf of CC Foundation dispute the Receiver's status as sole member of CC Foundation, that issue will be determined in the liquidation proceeding. The Attorney General also will be given notice of the liquidation proceeding, and, if the Attorney General objects to the relief the Receiver seeks, the liquidation court will have to rule on the Attorney General's objections. Of course, the Receiver anticipates that these efforts may be met with opposition which will require litigation. However, the Receiver should have the same right as any other member of a nonprofit corporation to the full exercise of his rights and powers, even if it results in litigation.

Most of the Attorney General's objections are addressed *infra* at 60-66. However, this discussion of the enforceability of CCCB's assignment of its interests in CC Foundation is the place to consider the Attorney General claims that the assignment is not enforceable because CC Foundation's by-laws prohibit the assignment, referring to Section 2.1. Attorney General Response at 4.

The by-laws[18] are attached hereto at Tab 1. The Attorney General is correct that Section 2.1 of those by-laws, as currently in force, appears to prohibit CCCB from assigning its membership interest. However, that issue was anticipated and eliminated in the Settlement Agreement. The Settlement Agreement obligates CCCB, within five (5) days of the Effective Date of the Settlement, to execute its "Consent of CharterCARE Community Board as Sole Member of CharterCARE Foundation," which amends the by-laws of CC Foundation to permit the assignment to the Receiver. Then, after[19] that Consent has been executed, and the by-laws of CC Foundation have thereby been amended to permit CCCB to assign its membership interests, the Settlement Agreement obligates CCCB to actually assign to the Receiver its membership interest in CCCB. Accordingly, the proposed assignment at the time it is due will not violate CC Foundation's by-laws.

None of the Objectors even contend that the Settlement Agreement violates the Rhode Island Nonprofit Corporation Act ("RINCA"), or that the Receiver is not eligible

[18] There is no dispute that these are the effective by-laws if CCCB is the sole member, because although CC Foundation's directors subsequently adopted new by-laws, the power to amend by-laws was exclusively reserved to CC Foundation's sole member, and CCCB never approved those subsequent by-laws.

[19] See Settlement Agreement ¶ 13 ("Within ten (10) business days after the Effective Date, the Settling Defendants agree to deliver to Plaintiff's Counsel an irrevocable assignment (the 'Irrevocable Assignment') to the Receiver of all of CCCB's Foundation Interests, effective ten (10) days thereafter. . . ."

under RINCA to assume the role of sole member of a nonprofit corporation such as CC Foundation. It certainly would be remarkable if any individual or corporation could be a "member" of a nonprofit corporation while a court-appointed receiver could not. In fact, RINCA places no restriction whatsoever on who can be a member of a nonprofit corporation.[20] Thus, the Receiver is just as entitled as anyone else to be the member of a nonprofit corporation. RINCA also does not place any restrictions on the right or power of a member to transfer its membership interests.

## VIII. The Attorney General's "Response" Raises No Legitimate Objections

### A. The Attorney General Is Not Objecting to CCCB's Transfer to the Receiver of Its 15% Interest in Prospect Chartercare

The first task in addressing the Attorney General's "Response" to the Petition for Settlement Instructions is to determine what exactly are the Attorney General's objections to the Proposed Settlement that he asks the Court to address in connection with the Petition for Settlement Instructions. The Attorney General's Response commences with the following summary of the Attorney General's position:

> Now comes Attorney General Peter F. Kilmartin ("Attorney General") and hereby files this Response to the Receiver's Petition for Settlement Instructions ("Petition").
>
> As set forth more fully below, after reviewing relevant documents and applicable law, the Attorney General has concluded that while the Proposed Settlement Agreement terms may conflict with the conditions the Attorney General imposed as part of his 2014 approval of the Prospect/CharterCARE transaction, the more immediate issue—**and the one the Attorney General believes requires the Court's attention at this juncture**—is the status of approximately $8.2 million in charitable assets that were the subject of this Court's 2015 Cy Pres order.

[20] Indeed, if receivers could not be members of a nonprofit corporation, then it would be impossible to perform a court-supervised liquidation of a nonprofit corporation that has nonprofit subsidiaries under R.I. Gen. Laws § 7-6-60 *et seq.*

Attorney General Response at 1 (emphasis supplied). From the above-quoted statement it can only be concluded that in connection with the Petition for Settlement Instructions, the Attorney General is *not* raising any objection to any provisions of the Proposed Settlement, except the provisions dealing with the assets CC Foundation received in connection with the 2015 *Cy Pres* Proceeding.

This limited focus is consistent with the balance of the Attorney General's Response, which makes no mention whatsoever of any other provisions of the Proposed Settlement, including those provisions dealing with CCCB's transfer to the Receiver of CCCB's 15% interest in Prospect Chartercare. The Attorney General's Response was the Attorney General's opportunity to raise objections to the Receiver's Petition for Settlement Instructions, and should include all objections.

We carefully delineate the Attorney General's objection, because, although Prospect East argues that the provisions concerning CCCB's transfer of its 15% interest are barred by the Attorney General's decision approving the Hospital Conversion Act application that transferred the hospitals' assets to various Prospect for-profit entities, it is important to note that the Attorney General is *not* making that argument on his own behalf, notwithstanding the Attorney General's assertion of continuing authority to police compliance with his Decision.[21] As discussed above, Prospect East's arguments should be rejected on the merits. They also should be rejected because even the Attorney General does not join in Prospect East's contentions.

[21] See Attorney General's Response at 2 ("The General Assembly has authorized the Attorney General to take corrective action both civilly and criminally, should information come to light suggesting that the parties which engaged in the original hospital conversion transaction have failed to adhere in whole or in part to the Department's conditions.").

### B. The Attorney General Is Not Disputing that CCCB Is the Sole Member of CC Foundation

As discussed above, CC Foundation accepts for purposes of the Court's adjudication of the Receiver's Petition for Settlement Instructions that CCCB is CC Foundation's sole member.

The Attorney General also does not dispute in his memorandum that CCCB is CC Foundation's sole member. However, that is not a concession solely for purposes of the Court's adjudication of the Receiver's Petition for Settlement Instructions. To the contrary, the Attorney General has already accepted as fact that CCCB is CC Foundation's sole member. The applicants for the Attorney General's approval for the 2014 Asset Sale told him that in their initial application, and he quoted their statements in his decision approving the 2014 Asset Sale. The Decision states as follows:

> "Subsequent to and as part of the CCHP affiliation, on August 25, 2011, the organizational documents of SJ Foundation were revised to change its name to CharterCARE Health Partners Foundation and to make CCHP its sole member."[71]

Attorney General's Decision dated May 16, 2014, at 29. The footnote designated "71" states "*Id*.", referring to prior footnote which states "[70] Initial Application, Response to Question 28." The applicants' answer to Question No. 28 indeed was that CCCB (then named CharterCARE Health Partners (CCHP")) was the sole member of CC Foundation (then named CharterCARE Health Partners Foundation).[22] The Attorney

[22] Initial Hospital Conversion Application Re-Submitted January 2, 2014 at 59 (Response to Question 28) ("By way of background, on February 27,2007, St. Joseph Health Services Foundation, Inc. (the 'SJ Foundation') was formed to hold and administer charitable donations on behalf of SJHSRI. SJ Foundation's sole member was SJHSRI and (footnote 21 cont.) it was listed in the official Catholic Directory and was covered by the Catholic Church's tax exemption. Subsequent to and as part of the

General adopted their statement as his own and both acknowledged and approved that arrangement by quoting it in his decision.

The Attorney General and this Court were told the same thing eight months later, in the 2015 *Cy Pres* Petition that was filed by SJHSRI, RWH, and CharterCare Health Partners Foundation (subsequently renamed CharterCare Foundation) on January 13, 2015. That Petition so states twice. In the first paragraph the Petition states:

> CCHP Foundation's sole member is CharterCARE Community Board, formerly known as CharterCARE Health Partners ("CCCB").

Cy Pres Petition ¶ 1. In the fourth paragraph the Petition states:

> CCCB is a Rhode Island 501(c)(3) non-profit corporation and the sole member of the CCHP Foundation. . . .

Cy Pres Petition ¶ 4. The Petition was served on the Attorney General and the Attorney General filed his formal response on April 1, 2015, without any objection to the representations to the Court that CCCB was CC Foundation's sole member.

Thus, the Attorney General does not and cannot dispute that CCCB is the sole member of CC Foundation.

### C. The Attorney General Approved Transfer of $8.2 Million to an Insider, in Violation of Rhode Island Law That Gives the Power of Approval to the Presiding Justice and Requires that the Transferee Be an Independent Foundation

The Attorney General himself admits that, in connection with transfers of hospital assets under the Hospital Conversions Act (HCA"), the General Assembly requires:

---

CCHP affiliation, on August 25, 2011, the organizational documents of SJ Foundation were revised to change its name to CharterCARE Health Partners Foundation and to make CCHP its sole member.").

> the creation of an independent non-profit foundation "to hold and distribute" the proceeds of the hospital conversion "consistent with the acquiree's original purpose[,] or for the support and promotion of health care and social needs in the affected community."

Attorney General Response at 2 (citing, *inter alia*, R.I. Gen. Laws § 23-17.14-22).

However, as discussed below, in connection with the 2015 *Cy Pres* Proceeding, the Attorney General completely disregarded, affirmatively violated, and allowed others to violate R.I. Gen. Laws § 23-17.14-22 and related HCA statutes on at least eight levels. Such actions would have been outrageous and likely criminal if a private citizen were responsible. In light of the fact that the Attorney General himself is one of the guilty parties who violated the HCA statutes, it is simply ludicrous that the Attorney General now claims the right to interfere with the Proposed Settlement, as the statutory enforcer of the HCA to which the Receiver (and the Court) must defer.

R.I. Gen. Laws § 23-17.14-22(a) & (b) state as follows:

> § 23-17.14-22. Distribution of proceeds from acquisition – Selection and establishment of an **independent foundation**.
>
> (a) In the event of the approval of a hospital conversion involving a not-for-profit corporation and a for-profit corporation results in a new entity as provided for in § 23-17.14-7(c)(25)(i), it shall be required that the proceeds from the sale and any endowments, restricted, unrestricted and specific purpose funds shall be transferred to a charitable foundation operated by a board of directors.
>
> (b) The **presiding justice of the superior court shall have the authority to**:
>
> > (1) **Appoint the initial board of directors**.
> >
> > (2) **Approve, modify, or reject proposed bylaws and/or articles of incorporation** provided by the transacting parties and/or the initial board of directors.

R.I. Gen. Laws § 23-17.14-22(a) & (b) (emphasis supplied). The Attorney General violated this statute 1) by approving the transfer of $8.2 million to an existing (not a

newly-created) foundation; 2) by allowing that foundation to be controlled by one of the transacting parties, rather than being independent; 3) by completely by-passing the authority of the Presiding Justice of the Superior Court to select the directors and, instead, allowing the parties to the Conversion themselves to select the directors for the foundation subject to the approval of the Attorney General; and 4) by completely by-passing the authority of the Presiding Justice to approve, modify, and reject the proposed articles of incorporation and by-laws of the foundation and, instead, allowing the parties to choose their own articles and by-laws subject to the approval of the Attorney General.

In seeking to justify preventing the Receiver from obtaining any rights in CC Foundation, the Attorney General actually contends that CC Foundation was "an entity the creation of which is statutorily required under the HCA". Attorney General's Response at 5. The Attorney General is wrong factually and contradicts his own Decision approving the Conversion which acknowledged that CC Foundation not only pre-existed the 2013-2014 HCA transaction, but, in fact, was formed in 2007.[23]

The Attorney General also violated and allowed others to violate R.I. Gen. Laws § 23-17.14-25, which states as follows:

> § 23-17.14-25. Implementation.
>
> (a) The presiding justice may take all steps necessary to effectuate the purposes of this chapter and the board shall be appointed no more than sixty (60) days after the completion of the conversion. The board shall act promptly to appoint an executive director, hire staff as necessary, acquire necessary facilities and supplies to begin the operation of the foundation;
>
> (b) The board shall conduct a public hearing to solicit comments on the proposed mission statement, program agenda, corporate structure, and strategic planning. The board shall hold a public hearing within one

[23] See *supra* at 53 n.22 and related text.

> hundred eighty (180) days of establishment of the board and on an annual basis thereafter.

These violations included that 1) the Presiding Justice was denied the opportunity to take any "steps necessary to effectuate the purposes of" Chapter 23-17.14; 2) no pre-approval "public hearing" was held of any kind in connection with the 2015 *Cy Pres* proceeding or the $8.2 million transfer to CC Foundation, much less a public hearing "to solicit comments on the proposed mission statement, program agenda, corporate structure, and strategic planning"; 3) no "public hearing" was held within 180 days thereafter, or at any time; and 4) certainly there have been no "public hearings" on an annual basis.

Thus, the Attorney General committed and allowed others to commit at least eight statutory violations looking at these two statutes alone.

It is indisputable that CC Foundation received $8.2 million because the Attorney General violated and allowed others to violate the HCA statutes he was required to enforce. The consequence was that the entire process was perverted to serve private interests who wanted to control the charitable assets of SJHSRI and RWH.

In addition to these violations of the HCA, the Attorney General acknowledged in his Decision approving the Conversion that SJHSRI and RWH were in voluntary dissolution, but completely ignored the requirement of R.I. Gen. Laws § 7-6-51 that a nonprofit corporation's charitable assets must be applied first to pay the creditors of the corporation, such as the Plan participants, before they can be transferred pursuant to a *cy pres* proceeding.[24] R.I. Gen. Laws § 7-6-51 states as follows:

[24] This issue is more fully discussed in the Receiver's Memorandum in Support of Motion to Intervene in the 2015 *Cy Pres* Proceeding, at 33-39.

> § 7-6-51. Distribution of assets.
>
> The assets of a corporation in the process of dissolution shall be applied and distributed as follows:
>
> (1) All liabilities and obligations of the corporation shall be paid and discharged, or adequate provision shall be made for their payment and discharge;
>
> (2) Assets held by the corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with the requirements;
>
> (3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes, but not held upon a condition requiring return, transfer, or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this chapter or as otherwise provided in its articles of incorporation or bylaws;
>
> (4) Any other assets shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others;
>
> (5) Any remaining assets may be distributed to any persons, societies, organizations, or domestic or foreign corporations, whether for profit or nonprofit, that may be specified in a plan of distribution adopted as provided in this chapter.

The court in In re Crossroad Health Ministry, Inc., 319 B.R. 778 (Bankr. D.D.C. 2005), *aff'd, sub nom.* Bierbower v. McCarthy, 334 B.R. 478 (D.D.C. 2005), construed the very phrase "shall be applied and distributed as follows" to unequivocally require a priority of payment to creditors, notwithstanding the same absence of any other additional language. See In re Crossroad Health Ministry, Inc., 319 B.R. at 781 ("The terminology 'as follows' suggests that distributions are to proceed in a sequential fashion, with expenses of dissolution and claims of creditors to be paid first as listed first.").

Notably, *cy pres* proceedings come third in the sequence. Sub-section (3) states that remaining charitable assets "shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation. . . ." However, the Attorney General placed his *cy pres* authority first, ahead of the claims of creditors.

In opposing the Petition for Settlement Instructions, the Attorney General claims to be acting on behalf of charitable donors, but first and foremost the Attorney General is required to apply the law, even if the law restricts his own imagined *cy pres* powers. The fact that the Attorney General violated the law in order to transfer power over $8.2 million from the Presiding Justice to himself should not be overlooked. This was a power grab by the Attorney General which ultimately benefitted private interests that had no right to the funds. The Attorney General unlawfully placed himself over the Presiding Justice of the Superior Court by arrogating her statutory powers to himself, and used his power to deprive the creditors of SJHSRI and RWH (including the Plan participants) of these assets.

As these matters proceed, it will become clear that the Attorney General also failed in his fundamental role of securing and monitoring Prospect East's binding commitment (and Prospect Medical Holding's binding guarantee of that commitment) to invest $50,000,000 over four years for long term capital projects, and an additional $10,000,000 per year for regular capital expenditures. This commitment and guarantee were touted proudly, frequently, and publically as part of a public relations campaign to push through the 2014 Asset Sale in which the Attorney General played a prominent part, but the reality was very different from what the Attorney General and others portrayed. In other words, there will be more revelations of equally or even damaging

serious violations by the Attorney General of the letter and spirit of the laws governing his role in connection with the 2014 Asset Sale, in favor of private interests.

### D. The Transfer of CCCB's Interest in CC Foundation to the Receiver Does Not Violate the Attorney General's Decision

#### 1. The Transfer Does Not Violate Conditions 1, 2, or 9

The Attorney General contends that the changes in CC Foundation's governance which will be required under the Settlement Agreement violate the conditions he imposed on his approval of the 2014 Asset Sale, asserting that "[t]hese proposed changes therefore appear to violate the overarching Condition #9, as well as the more specific Conditions # 1 and #2." Attorney General Response at 5.

As with all of the Attorney General's arguments, however, that contention does not withstand even cursory analysis. Conditions 1, 2 & 9 state as follows:

> 1. There shall be no board or officer overlap between or among the CCHP Foundation, CCHP, and Heritage Hospitals.
>
> 2. There shall be no board or officer overlap between or among the Prospect entities and the CCHP Foundation, CCHP and the Heritage Hospitals.
>
> * * *
>
> 9. That the transaction be implemented as outlined in the Initial Application, including all Exhibits and Supplemental Responses.

However, the Settlement Agreement does not provide for any board or officer overlap between any of the entities in Conditions 1 & 2, and the Attorney General does not explain how or why it violates these conditions.[25] It does not.

[25] In opposition to the Receiver's Motion to Intervene in the 2015 Cy Pres Proceeding, CC Foundation argued that the claim that CCCB was CC Foundation's sole member violated Condition 1 of the Attorney General's decision approving the 2014 Asset Sale, notwithstanding that Condition 1 only refers to overlap of board and officers, not members, and the Attorney General approved the transaction with CCCB as CC Foundation's sole member. Not surprisingly, CC Foundation does not repeat, and the Attorney

As for Condition 9, by definition that Condition could be violated only if the membership rights, power to elect directors, and power to amend by-laws upon which the Receiver relies are not part of the "Initial Application, including all Exhibits and Supplemental Responses." In fact the by-laws of CC Foundation, which confer the rights upon which the Receiver relies, were provided to the Attorney General and made an exhibit to the "Initial Application and Supplemental Responses."[26] Thus, all of the actions concerning CC Foundation contemplated in the Proposed Settlement are indeed pursuant to the "Initial Application, including all Exhibits and Supplemental Responses." The Attorney General had the right and obligation to disapprove those by-laws then, if he felt they violated the HCA. He did not.

Of course, it would have been ludicrous for the Attorney General to have required that all of the applicants and their related entities amend their existing by-laws to eliminate their membership rights, their power to elect directors, and their power to amend corporate by-laws. What the Attorney General appears to be arguing is that the HCA applicants and their constituent entities, and their by-laws, directors, and members, were frozen in time and place on June 20, 2014, and any changes since then are unenforceable, unlawful, and, indeed, criminal, even if permitted under by-laws the Attorney General approved. That argument is both legally and practically ridiculous.

The Attorney General claims that the Settlement Agreement violates Conditions 1, 2 & 9, and then asserts his right "to take corrective action, both civilly and criminally, should information come to light suggesting that the parties which engaged in the

---

General does not assert, that patently meritless argument in opposition to the Receiver's Petition for Settlement Instructions.

[26] See Tab 3 (Affidavit of Benjamin Ledsham dated October 5, 2018) ¶¶ 2-6.

original hospital conversion transaction have failed to adhere in whole or in part to the Department's conditions." Attorney General's Response at 2-3. Such extortionate threats applied to the facts of the Proposed Settlement are disturbing indeed, when made by an actor with such unclean hands.

### 2. The Proposed Settlement Does Not Create Any Unlawful Conflicts of Interest

The Attorney General also objects that "the Agreement's proposed changes to the by-laws, whereby the board is stacked with compliant members in order to redirect the use of the Foundation's funds, creates conflicts of interest for these board members in terms of their fiduciary duty to the Foundation itself." Attorney General's Response at 4-5. Thus, the Attorney General asks the Court to rule that a member of a nonprofit corporation intent on exercising his legal rights with respect to the assets of nonprofit corporation cannot appoint "compliant members" of the board. In other words, he or she must elect directors who will frustrate and block the member from exercising his legal rights. Of course, that is patently absurd. If the member is lawfully exercising rights provided to the member under the by-laws, not only may a director assist him, he must.

Moreover, the assumption that the directors of CC Foundation that CCCB will elect in connection with the settlement (Attorneys Violet, Kasle, and Callaci) will not adhere to their fiduciary duties to CC Foundation because the Receiver selected them ignores the obvious fact that corporate directors are commonly, if not always, elected by shareholders or (in nonprofit corporations) members. That hardly disqualifies them.

If the Attorney General is implying that the court-appointed Receiver, acting as sole member of CC Foundation, will act unlawfully, and enlist the foundation's board of

directors in his unlawful schemes, and Attorneys Violet, Kasle, and Callaci will go along with those schemes, the Attorney General should simply come out and say so.

### 3. The Proposed Settlement Does Not Purport to Bind the Current "Directors" of CC Foundation to Do Anything

The Attorney General objects that "the Proposed Settlement Agreement tries to bind the current board of the Foundation in order to alter § 2.01 of the by-laws even though the current board is not a party to the Proposed Settlement Agreement." Attorney General's Response at 4. The Attorney General again misreads the Settlement Agreement. It obligates the current board of CCCB, acting on behalf of CCCB as sole member of CC Foundation, to amend the by-laws of CC Foundation. See Settlement Agreement Exhibit 12 (Consent of CharterCARE Community Board as Sole Member of CharterCARE Foundation). CCCB is most certainly a party to the Proposed Settlement. If indeed CCCB is the sole member of CC Foundation, as the Receiver contends and the Attorney General has agreed, then only CCCB has the power to amend the by-laws, because that power is expressly reserved to the member. The board of directors of CC Foundation does not even have that power.

### 4. The Proposed Settlement Does Not Unlawfully Alter the Corporate Governance and Structure of CC Foundation

The Attorney General then makes the following contentions:

> The Proposed Settlement Agreement seeks to alter the corporate structure and governance of the Foundation—an entity the creation of which is statutorily required under the HCA—and then to divert charitable assets from the Foundation for the plaintiffs' benefit without regard to the restrictions donors had previously imposed on the intended use of those assets. The Proposed Settlement Agreement's terms thus set entirely at naught the extensive HCA application and investigation process undertaken by the Attorney General before he approved the Prospect/CharterCARE acquisition in 2014.

Attorney General Response at 5. What the Attorney General overlooks, however, is that the Receiver will "alter the corporate structure and governance of the Foundation" pursuant to CC Foundation's by-laws, which were submitted to, reviewed, and approved by the Attorney General in connection with the 2014 Asset Sale. In other words, the Receiver will be exercising powers that the Attorney General has already approved. Thus, rather than deviating from the structure which the Attorney General approved, the Receiver will be applying that structure.

Moreover, there is nothing unusual or unlawful in CC Foundation's by-laws, to which the Attorney General could object even now. Under RINCA, the member of a non-profit corporation is entitled to elect directors if the by-laws so provide:

> (b) The directors constituting the first board of directors shall be named in the articles of incorporation and hold office until the first annual election of directors or for any other period that may be specified in the articles of incorporation or the bylaws. **Subsequently, directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the bylaws.** In the absence of a provision fixing the term of office, the term of office of a director is one year.

R.I. Gen. Laws § 7-6-23(b) (emphasis supplied). Those directors have the power to amend the by-laws unless the articles of incorporation or by-laws provide otherwise:

> The initial bylaws of a corporation shall be adopted by its board of directors. **The power to alter, amend, or repeal the bylaws or adopt new bylaws is vested in the board of directors** unless otherwise provided in the articles of incorporation or the bylaws. The bylaws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation.

R.I. Gen. Laws § 7-6-16 (emphasis supplied). If the Attorney General wanted to prohibit the sole member of CC Foundation from electing the directors and amending the by-laws, the Attorney General should have done so. Instead he approved the very by-laws to which he now objects.

In short, the Attorney General is grasping at straws to justify his opposition to the Receiver's Petition for Settlement Instructions. In fact that opposition is based upon a callous disregard for the rights of the Plan participants to the pensions they earned, and preference for the for-profit operations of Prospect Chartercare. What shows that best is the Attorney General's argument that CC Foundation's assets can only be used for "funding a pension liability" if that "is necessary to save a hospital's collapse," and that "[i]f diverting this income will not have any impact on the provision of health care by the existing providers, then in the State's view, application of *cy pres* is not justified." Attorney General's Response at 9. The "existing hospitals" are the for-profit entities Prospect Chartercare St. Joseph and Prospect Chartercare Roger Williams.

Thus, even now, the Attorney General is opposed to the Plan participants receiving the funds transferred to CC Foundation in connection with the 2015 *Cy Pres* Proceeding, with one exception -- if necessary to prevent the for-profit hospitals' collapse. The Attorney General makes these statements but completely ignores the point that these funds properly should have been paid to the Plan in 2014.

Incidentally, and not out of any desire to benefit Prospect East, the fact is that Prospect Chartercare St. Joseph and Prospect Chartercare Roger Williams (and all of the other Prospect entities who are Defendants in the Federal Court Action) will benefit from the Plan participants' receipt of those funds, because that will reduce their damages against them. Many of their current employees will also benefit in the capacities as Plan participants. Thus, the Attorney General should be supporting the Proposed Settlement under his own twisted logic that his support is dependent upon a showing that it will aid the existing hospitals.

At the very least, the Attorney General failed to "mind the store" when it came to the rights of Plan participants in 2014, and continues to oppose their assertion of their lawful rights. Apparently, it will take the zealous advocacy of the Receiver on behalf of the Plan participants to obtain for them what was rightfully theirs over four years ago.

## CONCLUSION

Accordingly, the Receiver requests that the Court deny the objections of CC Foundation, prospect East, and the Attorney General, and recommends that the Court authorize and direct the Receiver to proceed with the Proposed Settlement.

Respondent,
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By his Attorneys,

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Dated: October 5, 2018

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 10/5/2018 3:03 PM
Envelope: 1746265
Reviewer: Alexa G.

**CERTIFICATE OF SERVICE**

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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Max Wistow

# EXHIBIT 1

# REVISED

# BY-LAWS

# OF

# CHARTERCARE HEALTH PARTNERS FOUNDATION

Adopted on August 22, 2011 and revised on October 8, 2013*

By: _____
Kenneth Belcher, Secretary

*This revision is to address a typographical error in Section 2.01 of the Bylaws which identified CharterCare Health Partners as "SJHSRI" rather "CCHP" and is in furtherance of the resolution approved at a Meeting of the Sole Member and the Directors of St. Joseph Health Services Foundation dated August 22, 2011, that changed the name of the Foundation to "CharterCare Health Partners Foundation" and directed that its sole member be CharterCare Health Partners..

ARTICLE I

GENERAL

SECTION 1.01. Name and Purpose. CharterCare Health Partners Foundation (the "Foundation") is a nonprofit corporation organized exclusively for charitable, scientific and educational purposes within the meaning of Section 501(c) (3) of the Internal Revenue Code of 1986, as amended from time to time (the "Code"), and the regulations promulgated thereunder. Such purposes are set out in Article Third of the Articles of Incorporation of the Foundation, from time to time in effect (the "Articles of Incorporation").

Notwithstanding any other provision of the Articles of Incorporation or these By-Laws, the Foundation shall not carry on any activities not permitted to be carried on by a corporation exempt from federal income tax under Section 501(c)(3) of the Code or corresponding section of any future federal tax code. No substantial part of the activities of the Foundation shall be carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided by Section 501(h) of the Code), or participating in, or intervening in (including the publication or distribution of statements), any political campaign on behalf of any candidate for public office.

SECTION 1.02. Powers. The Foundation shall have the power, either directly or indirectly, either alone or in conjunction and/or cooperation with others, to do any and all lawful acts and things and to engage in any and all lawful activities which may be necessary, useful, suitable, desirable or proper for the furtherance, accomplishment, fostering or attainment of any or all of the purposes for which the Foundation is organized, and to aid or assist other organizations whose activities are such as to further accomplish, foster, or attain any of the Foundation's purposes. Notwithstanding anything herein to the contrary, the Foundation shall exercise only such powers as are in furtherance of the exempt purposes of organizations as set

forth in Section 501(c)(3) and the Code and the rules and regulations promulgated thereunder.

SECTION 1.03. Nonprofit Status. The Foundation is not organized for profit and no part of the net earnings of the Foundation shall inure to the benefit of any director or officer. In the event of the liquidation of the Foundation, whether voluntary or involuntary, no director or officer shall be entitled to any distribution or division of the Foundation's property or the proceeds thereof, and upon such liquidation, the balance of all money, assets and other property of the Foundation, after the payment of all its debts and obligations, shall be distributed pursuant to Section 8 of Article Fourth of the Articles of Incorporation.

SECTION 1.04. Principal Office. The principal office of the Foundation shall be located at 200 High Service Avenue, North Providence, Rhode Island. The Foundation may have such other offices or places of business, either within or outside the State of Rhode Island, as the business of the Foundation may require and as the Board of Directors may from time to time establish.

SECTION 1.05. Registered Office. The registered office of the Foundation shall be located 200 High Service Avenue, North Providence, Rhode Island. The registered office may be changed from time to time by the Board of Directors in compliance with the provisions of applicable law.

## ARTICLE II

## MEMBERSHIP

SECTION 2.01. Membership. The sole Member of the Foundation shall be CharterCare Health Partners ("CCHP"), a Rhode Island non-profit corporation qualifying as tax-exempt under Section 501(c)(3) of the Code. CCHP may from time to time designate a representative who shall act with the full power and authority of the Member. No membership may be assigned

or transferred or encumbered in any manner whatsoever, either voluntarily, involuntarily or by operation of law. Any proposed or attempted assignment, transfer or termination of membership shall be void. Notwithstanding the foregoing, any legally appointed successor to CCHP by way of corporate merger, acquisition or other similar event shall become the sole Member hereof.

SECTION 2.02. Enumerated Powers. The powers of the Members shall be limited to taking action on the activities enumerated below and those activities expressly requiring action of the Members pursuant to law or the Articles of Incorporation:

(a) election of the independent directors;

(b) authorization or approval of any amendment to the Articles of Incorporation of the Foundation;

(c) authorization or approval of any amendment to the By-Laws of the Foundation;

(d) authorization or approval of any change to the name of the Foundation;

(e) authorization or approval of any merger, consolidation, reorganization, or sale, transfer, disposition, pledge or hypothecation of all or substantially all of the assets of the Foundation;

(f) authorization or approval of the establishment and the organizational documents (including any amendment, revision or repeal thereof), of any equity or contractual joint venture between the Foundation and any third party in which the Foundation will have more than a twenty percent (20%) interest in the revenues or profits of the joint venture, excluding contracts in the ordinary course of business;

(g) authorization or approval of any plan of dissolution, liquidation,

assignment for the benefit of creditors, petition for voluntary bankruptcy or appointment of a receiver, or any plan for winding up the affairs of the Foundation, or any liquidating distribution by the Foundation;

(h) authorization or approval of the incurrence of any debt, loan, borrowing, debt guarantee, whether as primary obligor or co-obligor, pledge, lien, hypothecation, security interest or encumbrance on any of the property or assets of the Foundation;

(i) authorization or approval of any acquisition or lease of, or interest in, real estate, by the Foundation;

(j) authorization or approval of undertaking any expenditure outside of the annual budget whether by contract or otherwise, in excess of $25,000;

(k) authorization or approval of entering into any contract or commitment which involves aggregate payments in excess of $50,000 in any year; and

(l) authorization or approval of the settlement of any litigation or other dispute involving the Foundation.

SECTION 2.03. Annual Meeting. The annual meeting of the Members shall be held on such date and at such place and time as the Board may designate. If such meeting is for any reason not held on the date determined in accordance with this section, a special meeting, as defined below, in lieu of the annual meeting may be held with the same force and effect of the annual meeting.

SECTION 2.04. Special Meetings. A special meeting of the Member may be called at any time by the President, the Board of the Foundation, or by the Member.

SECTION 2.05. Notice. Notice of the annual meeting or any special meeting shall be

given by the Secretary to the Member at the Member's address on file with the Secretary either by mail or electronic communication, at least seven (7) days prior to the meeting and in the case of a special meeting, stating the purpose thereof.

SECTION 2.06. Voting. The Member shall have one (1) vote on all matters on which the Member is entitled to vote.

SECTION 2.07. Action Without a Meeting. Any action required or permitted to be taken by the Member may be taken without a meeting if the Member consents in writing and if such written consent is filed with the records of the Foundation. Such consents shall be treated for all purposes as a vote at a meeting.

## ARTICLE III

## BOARD OF DIRECTORS

SECTION 3.01. General Powers. The Foundation's property, affairs and business shall be managed by the Board and the Board shall have, and may exercise, all of the powers of the Foundation, except those reserved to the Members by law, the Articles or these By-Laws.

SECTION 3.02. Number; Qualification and Election. The members of the Board serving at the time CharterCARE Health Partners becomes the sole Member of the Foundation shall remain in office until a new Board is elected by the sole Member at its annual meeting or at a special meeting. Commencing with such election the Board shall consist of a total of fifteen (15) directors, which shall include two (2) individuals who shall be ex officio directors and the remaining thirteen (13) directors who shall be elected as set forth herein by the Member at its annual meeting or at a special meeting. Each member of the Board shall have equal voting authority. The two (2) ex officio members of the Board shall be the individuals then serving as the Chief Executive Officer ("CEO") and the Chief Financial Officer ("CFO") of CharterCARE

Health Partners and the thirteen (13) remaining members of the Board shall consist of four (4) individuals selected by the Member from among those individuals who are then serving as members of the CharterCARE Health Partners Board of Trustees, two (2) individuals selected by the Member from among those individuals who are then serving as members of the Roger Williams Medical Center Board of Trustees, two (2) individuals selected by the Member from among those individuals who are then serving as members of the CharterCare Health Partners Board of Trustees and five (5) individuals who shall be independent directors. An ex officio director who is no longer serving as either the CEO or the CFO of CharterCARE Health Partner shall be immediately replaced by the individual then serving in that capacity and a director who was selected by the Member as set forth herein from among the members of the Board of Trustees of CharterCARE Health Partners, Roger Williams Medical Center or CharterCare Health Partners who is no longer serving in that capacity shall be immediately replaced by the individual then serving in that capacity.

SECTION 3.03. Nomination Process. The Nominating Committee of the Member shall serve as the Nominating Committee. At least fifteen (15) days prior to the Member's annual meeting or a special meeting called for the election or replacement of directors of the Foundation, the Nominating Committee shall provide to the Board of Trustees of the Member a list of nominees for election as independent directors and a list of nominees for election as directors from the members of the Boards of Trustees of CharterCARE Health Partners, Roger Williams Medical Center and CharterCare Health Partners. The Nominating Committee shall adopt such procedures, including procedures for the solicitation of potential nominees, as are necessary to carry out its duties.

SECTION 3.04. Increase and Decrease in Number. The number and designation of

directors of the Foundation may be modified from time to time by majority vote of the Board.

SECTION 3.05. Term. Each director, other than ex officio directors and other than as set forth herein, shall hold office for a three (3) year term, up to a maximum of two (2) terms, and until a successor shall have been duly appointed and qualified or until death, resignation or removal in the manner hereinafter provided and each ex officio director shall hold office so long as he or she is serving as either the CEO or the CFO of CharterCARE Health Partners. Terms of the initial directors elected after CharterCARE Health Partners becomes the sole Member at its annual meeting or at a special meeting shall be staggered such that each year the terms of a portion of the directors shall expire.

SECTION 3.06. Quorum and Voting. A majority of the total number of directors at the time in office shall constitute a quorum for the transaction of business at any meeting. In the absence of a quorum, a majority of the directors present may adjourn any meeting from time to time without further notice until a quorum be had. Each director shall have one (1) vote on all matters addressed by the Board. The directors shall act only as a Board, and the individual director shall have no power as such.

SECTION 3.07. Place of Meetings. The Board may hold its meetings at any place within or without the State of Rhode Island as it may from time to time determine and shall be specified or fixed in the respective notices or waivers of notice thereof.

SECTION 3.08. Action Without a Meeting. Any action required or permitted to be taken by the directors may be taken without a meeting if all of the directors consent in writing and if the written consents are filed with the Foundation's records. Such consents shall be treated for all purposes as a vote at a meeting.

SECTION 3.09. Telephonic Participation In Meetings. Directors may participate in their

respective meetings by means of telephone conference call or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time, and participation by such means shall constitute presence in person at a meeting.

SECTION 3.10. Annual Meetings. The annual meeting of the Board shall be held immediately following the Members' annual meeting. If any day in which the annual meeting is fixed shall be a legal holiday, then the meeting shall be held on the next succeeding business day that is not a legal holiday. If for any reason such annual meeting is omitted, a special meeting may be held in place thereof and any business transacted or elections held at such special meeting shall have the same effect as if transacted at the annual meeting. Purposes for which an annual meeting is to be held, in addition to those prescribed by law or these By-Laws, may be specified by the President or by a majority of the Board.

SECTION 3.11. Regular Meetings. Regular meetings of the Board shall be held as often as the Board shall determine from time to time by vote. If any day fixed for a regular meeting shall be a legal holiday at the place where the meeting is to be held, then the meeting which would otherwise be held on that day shall be held at the same hour on the next succeeding business day that is not a legal holiday. Notice of regular meetings need not be given.

SECTION 3.12. Special Meetings; Notice. Special meetings of the Board shall be held whenever called by the President. Notice of each such meeting shall be given by the Secretary or the person calling the meeting by mailing such notice addressed to each director at his/her residence or usual place of business, or conveying such notice electronically, verbally by telephone or personally, at least twenty-four (24) hours before the time at which the meeting is to be held. Every such notice shall state the time and place of the meeting, but need not state the purpose thereof except as otherwise expressly provided in these By-Laws. A statement contained

in the minutes of any Board meeting over the signature of the Secretary to the effect that due notice of such meeting has been given shall be conclusive evidence that proper notice of such Meeting has been duly given.

SECTION 3.13. Waiver of Notice. Notice of the time, place and purpose (unless otherwise specified) of any Board meeting may be waived in writing by any director either before or after such meeting and attendance in person at a Board meeting or any meeting held in lieu thereof shall be equivalent to having waived notice thereof.

SECTION 3.14. Resignation of Directors. Any director may resign at any time by providing written notice to the Board, the President or the Secretary. Any director's resignation shall take effect at the time specified therein and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 3.15. Removal of Directors. Subject to these By-Laws, any director may be removed, either with or without cause, by the vote of a majority of the directors at a special meeting called for said purpose.

SECTION 3.16. Vacancies. In the case of director vacancies caused by death, resignation, removal, disqualification or any other cause, the Board, by an affirmative vote of a majority of the directors then in office, shall use best efforts to elect a duly-qualified individual to serve the remainder of the departing director's term. Notwithstanding the foregoing, any actions taken at a meeting or as otherwise provided herein while such positions are vacant shall be valid so long as a quorum is then present.

SECTION 3.17. Compensation. No director shall receive any compensation for his/her services as a director of the Foundation.

ARTICLE IV

COMMITTEES

SECTION 4.01. Appointment. The Board may from time to time by vote create such committees of directors, officers, employees or other persons for the purpose of advising the Foundation's Board, officers and/or employees in all such matters as the Board shall deem advisable and with such functions and duties as the Board shall prescribe by vote. Each committee shall have a chairperson appointed by the President. Unless otherwise expressly required in these By-Laws, committee members shall be appointed by the President; provided, however, that any such appointment may be reversed by majority vote of the Board. Committee members may be but need not be directors. The Board shall have power to increase or decrease the number of members on any committee at any time and to discharge any such committee, either with or without cause, at any time.

SECTION 4.03. Meetings and Notice. Committee meetings may be called by the President or the committee chairperson. Each committee shall meet as often as necessary and appropriate to perform its duties. Notice of a meeting's date, time and place shall be given at such time and in such manner as to provide reasonable notice to committee members of the meeting. Each committee shall keep minutes of its proceedings.

SECTION 4.04. Removal and Vacancies. The President may remove any committee member or chairperson whose selection is not otherwise specified in the By-Laws. Vacancies in any committee's membership may be filled by appointments made in the same manner as provided for in the original appointments.

SECTION 4.05. Quorum. Unless otherwise provided in the Board's resolution designating a committee, each committee member shall have one (1) vote and a majority of the

whole committee shall constitute a quorum. The act of a majority of the members present at a committee meeting at which a quorum is present shall constitute the act of the committee.

SECTION 4.06. Rules. Each committee may adopt rules for its own governance not inconsistent with these By-Laws or with any roles adopted by the directors.

## ARTICLE V

## OFFICERS

SECTION 5.01. Enumeration. The officers of the Foundation shall consist of a President, a Secretary, and a Treasurer, and such other officers as the Board may from time to time appoint. Each officer of the Foundation shall be a director.

SECTION 5.02. Election, Qualifications and Term of Office. The officers shall be elected by the Board at the annual meeting of the Foundation or special meeting held in lieu thereof. Each officer shall hold office for a one (1) year term and until a successor shall have been duly elected and qualified or until death, resignation, disqualification or removal in the manner hereinafter provided.

SECTION 5.03. Removal. Any officer may be removed, either with or without cause, by the vote of a majority of the directors at a special meeting called for said purpose.

SECTION 5.04. Resignation. Any officer may resign at any time by giving written notice to the Board or to the Secretary. Any such resignation shall take effect at the date of receipt of such notice or at any later time specified herein and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 5.05. Vacancies. A vacancy in any office because of death, resignation, removal, disqualification or any other cause shall be filled for the unexpired portion of the term by the Board at any regular or special meeting.

SECTION 5.06. The President. The President shall act as chair of the Board and have general charge and supervision of the affairs of the Foundation. The President shall perform such other duties assigned to him/her by the Board.

SECTION 5.08. The Secretary. The Secretary shall record or cause to be recorded all the proceedings of Board meetings and meetings of all committees to which a secretary shall not have been appointed; shall see that all notices are duly given in accordance with the provisions of these By-Laws and as required by law; shall be custodian of the records and of the Foundation's seal; and have such other powers and perform such other duties as the Board may from time to time prescribe.

SECTION 5.09. The Treasurer. The Treasurer shall have charge and custody of, and be responsible for, all Foundation funds, credits and property, render a statement concerning the condition of the Foundation's finances at all regular meetings and, upon the Board's request, make a full financial report to the Board. The Treasurer also shall have charge of the Foundation's books and records of account, which shall be kept at such office of the Foundation as the Board shall from time to time designate; be responsible for the keeping of correct and adequate records of the Foundation's assets, liabilities, business and transactions and at all reasonable times exhibit the books and records of account to any of the directors; review the Foundation's budget annually; be responsible for monitoring the budget; and, in general, perform all the duties incident to the office of Treasurer and such other duties as from time to time may be assigned by the Board or the President.

SECTION 5.10. Other Officers. Each other officer chosen by the directors shall perform such duties and have such powers as may be designated from time to time by the Board.

SECTION 5.11. Other Powers and Duties. Each officer shall, subject to these By-Laws

and in addition to the duties and powers specifically set forth in these By-Laws, have such duties and powers as are customarily incident to his/her office. The exercise of any power which by law, the Articles or these By-Laws, or in accordance with any vote of the Board, may be exercised by a Foundation officer only in the event of another officer's absence or any other contingency, shall bind the Foundation in favor of anyone relying therein in good faith, whether or not such absence or contingency existed.

SECTION 5.12. Bonding. Any officer, employee, agent or factor shall give such bond with such surety or sureties for the faithful performance of his/her duties as the Board may from time to time require.

## ARTICLE VI

## INDEMNIFICATION OF DIRECTORS AND OFFICERS

SECTION 6.01. Indemnification. Subject to the exclusions hereinafter set forth, the Foundation will indemnify an Indemnified Person against and hold the Indemnified Person harmless from any Covered Loss or Covered Expenses.

SECTION 6.02. Advance Payment of Covered Expenses. The Foundation will pay the Covered Expenses of an Indemnified Person in advance of the final disposition of any Proceeding. The advance payment of Covered Expenses will be subject to the Indemnified Person's first agreeing in writing with the Foundation to repay the sums paid by it hereunder if it is thereafter determined that the Proceeding involved an Excluded Claim or that the Indemnified Person was otherwise not entitled to indemnity under this Article VI.

SECTION 6.03. Exclusions.

(a) The Foundation will not be liable to pay any Covered Loss or Covered Expense (an "Excluded Claim"):

(i) With respect to a Proceeding, if the Foundation determines that the Indemnified Person (i) did not conduct himself or herself in good faith, (ii) engaged in intentional misconduct, and (iii) in the case of a criminal proceeding, knowingly violated the law;

(ii) With respect to a Proceeding in which a final judgment or other final adjudication determines that the Indemnified Person is liable on the basis that personal benefit was improperly received by him or her;

(iii) For which the Indemnified Person is otherwise indemnified or reimbursed; or

(iv) If a final judgment or other final adjudication determines that such payment is unlawful.

(b) With respect to a Proceeding by or on behalf of the Foundation in which the Indemnified Person is adjudged to be liable to the Foundation, the Foundation may indemnify the Indemnified Person for his or her Covered Expenses but shall not indemnify the Indemnified Person for his or her Covered Loss.

(c) Notwithstanding any other provisions herein, the Foundation shall indemnify an Indemnified Person for any Covered Expense in the event that the Indemnified Person is wholly successful, on the merits or otherwise, in the defense of any Proceeding under Section 6.03(a)(i).

SECTION 6.04. Notice to Foundation; Insurance. Promptly after receipt by the Indemnified Person of the notice of the commencement of or the threat of commencement of any Proceeding, the Indemnified Person will, if indemnification with respect thereto may be sought from the Foundation under this Article VI, notify the Foundation of the commencement thereof. If, at the time of the receipt of such notice, the Foundation has any directors' and officers'

liability insurance in effect, the Foundation will give prompt notice of the commencement of such Proceeding to the insurer in accordance with the procedures set forth in the policy or policies in favor of the Indemnified Person. The Foundation will thereafter take all necessary or desirable action to cause such insurer to pay, on behalf of the Indemnified Person, any and all Covered Loss and Covered Expense payable as a result of such Proceeding in accordance with the terms of such policies.

SECTION 6.05. Indemnification Procedures.

(a) Payments on account of the Foundation's indemnity against Covered Loss will be subject to the Foundation's first determining that the Covered Loss results from a claim which is not an Excluded Claim. Such a determination will be made by a majority vote of a quorum of Trustees not at the time parties to the Proceeding or by majority vote of the Members. The determination required by this Section 6.05 will be made within sixty (60) days of the Indemnified Person's written request for payment of a Loss, and if it is determined that the Covered Loss is not an Excluded Claim, payment will be made forthwith thereafter.

(b) Payment of an Indemnified Person's Covered Expenses in advance of the final disposition of any Proceeding will be made within twenty (20) days of the Indemnified Person's written request therefor. Any determination required as to the reasonableness of requested Covered Expenses shall be made in accordance with Section 6.05(a). From time to time prior to the payment of Covered Expenses, the Foundation may, but is not required to, determine (in accordance with Section 6.05(a) above) whether the Covered Expenses claimed may reasonably be expected, upon final disposition of the Proceeding, to constitute an Excluded Claim. If such a determination is pending, payment of the Indemnified Person's Covered Expenses may be delayed up to sixty (60) days after the Indemnified Person's written request therefor, and if it is

determined that the Covered Expenses are not an Excluded Claim, payment will be made forthwith thereafter.

SECTION 6.06. Settlement. The Foundation will have no obligation to indemnity the Indemnified Person under this Article VI for any amounts paid in settlement of any Proceeding effected without the Foundation's prior written consent. The Foundation will not unreasonably withhold or delay its consent to any proposed settlement The Foundation may consent to a settlement subject to the requirement that a determination thereafter will be made as to whether the Proceeding involved an Excluded Claim or not.

SECTION 6.07. Rights Not Exclusive. The rights provided hereunder will not be deemed exclusive of any other rights to which the Indemnified Person may be entitled under the Act, any agreement, vote of disinterested directors or otherwise, both as to action in the Indemnified Person's official capacity and as to action in any other capacity while holding such position or office, and shall continue after the Indemnified Person ceases to serve the Foundation in an official capacity.

SECTION 6.08. Enforcement.

(a) The Indemnified Person's right to indemnification hereunder will be enforceable by the Indemnified Person in any court of competent jurisdiction and will be enforceable notwithstanding that an adverse determination has been made as provided in Section 6.05 above.

(b) In the event that any action is instituted by the Indemnified Person under this Article VI to enforce or interpret any of the terms of this Article VI, the Indemnified Person will be entitled to be paid all court costs and expenses, including reasonable attorneys' fees, incurred by the Indemnified Person with respect to such action, unless the court determines that each of the material assertions made by the Indemnified Person as a basis for such action was not made

in good faith or was frivolous.

SECTION 6.09. Successors and Assigns. This Article VI will be (a) binding upon all successors and assigns of the Foundation (including any transferee of all or substantially all of its assets); and (b) binding on and inure to the benefit of the heirs, executors, administrators, and other personal representatives of the Indemnified Person. If the Foundation sells or otherwise transfers all or substantially all of its assets to a third party, the Foundation will, as a condition of such sale or other transfer, require such third party to assume and perform the obligations of the Foundation under this Article VI.

SECTION 6.10. Amendment. No amendment of this Article VI will be effective as to an Indemnified Person without such Indemnified Person's written consent.

SECTION 6.11. Insurance. The Foundation shall have, to the fullest extent permitted by state and federal law, the power to purchase and maintain insurance on behalf of any Indemnified Person against any liability asserted against or incurred by an Indemnified Person arising out of his or her status as an Indemnified Person whether or not the Foundation would have the power to indemnity the Indemnified Person against such liability pursuant to this Article VI.

SECTION 12. Definitions.

"Covered Act" means any act or omission by an Indemnified Person in the Indemnified Person's official capacity as a member of the governing body, director, trustee, officer, employee or agent of another limited liability company, corporation, partnership, joint venture, trust or other entity or enterprise, including entities and enterprises which are subsidiaries or affiliates of the Foundation, or employee benefit plan.

"Covered Expense" means any reasonable expense incurred by an Indemnified Person in connection with the defense of any claim made against the Indemnified Person for Covered Acts

including legal, accounting or investigative fees and expenses, including the expense of bonds necessary to pursue an appeal of an adverse judgment.

"Covered Loss" means any amount which an Indemnified Person is legally obligated to pay as a result of any claim made against the Indemnified Person for a Covered Act including judgment for, and awards of, damages, amounts paid in settlement of any claim, any fine or penalty or, with respect to an employee benefit plan, any excise tax or penalty.

"Excluded Claim" is defined in Section 6.03.

"Indemnified Person" means any individual who is or was a director or officer of the Foundation.

"Proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative.

## ARTICLE VII

## CONFLICT OF INTEREST

SECTION 7.01. Policy Adoption. The Foundation is committed to pursuing its mission and to conducting its affairs in accordance with high professional, religious and ethical standards which include the avoidance of detrimental conflicts of interest. The Foundation believes that avoiding such conflicts is imperative in preserving the public's trust. Persons who agree to serve the Foundation should not use their position for personal gain, or to expose the Foundation to potential harm as a result of conflict of interest.

The Foundation shall adopt and maintain a Conflict of Interest Policy which applies to Designated Persons, as defined below, and deliberations by the Board and its committees.

SECTION 7.02. General Principles. Any Designated Person has an obligation to: (i) protect decisions involving the Foundation against conflicts of interest; (ii) maintain the

confidentiality of information obtained through service to the Foundation; (iii) assure that the Foundation acts for the benefit of the community as a whole rather than for the private benefit of a Designated Person; and (iv) fully disclose any personal business opportunities that are competitive with the Foundation or in which the Foundation would have an interest. In the furtherance of these obligations all Designated Persons shall exercise the utmost good faith in all transactions touching upon their duties to the Foundation or its property. In their dealings with and on behalf of the Foundation, they shall be held to a strict standard of honest and fair dealing. Designated Persons shall scrupulously avoid any conflict between their individual interests and the interests of the Foundation in any and all actions taken by them. They shall disclose any interests or activities in which they are involved or become involved, directly or indirectly, that could conflict with the interests or activities of the Foundation and shall obtain approval prior to commencing, continuing, or consummating any activity or transaction which raises a possible conflict of interest. Designated Persons are also obliged to disclose any potential conflict of interest arising from the interests and activities of their Immediate Family, as defined in the Policy. Failure to comply with the Conflict of Interest Policy may disqualify a person from serving as a Designated Person or, if already serving as a Designated Person, may, if the Designated Person is an employee of the Foundation, result in disciplinary action up to and including dismissal, subject to the terms of any applicable employment or collective bargaining agreement or, in the case of a Designated Person who is a Trustee, the Trustee shall be deemed to have resigned.

SECTION 7.03. Designated Persons. "Designated Persons" shall include the following:

(a) Members of the Board of Directors of the Foundation;

(b) Members of administration or senior management of the Foundation;

(c) Committee Chairpersons or members of a Committee with Board delegated powers, who have a direct or indirect ability to influence the use of Foundation resources;

(d) Persons and/or staff members with the authority to purchase, to select or to influence the purchase of goods or services on behalf of the Foundation; and

(e) Any other person(s) and/or staff members whom the Board may from time to time designate.

## ARTICLE VIII

## FISCAL AUTHORITY

SECTION 8.01. Deposits. All funds of the Foundation shall be deposited from time to time to the credit of the Foundation in such banks, trust companies or other depositories as the directors may select.

SECTION 8.02. Gifts. The directors may accept on behalf of the Foundation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the Foundation.

SECTION 8.03. Budget. An annual budget shall be prepared at the President's direction for approval by the directors at their annual meeting.

## ARTICLE IX

## EXECUTION OF DOCUMENTS

SECTION 9.01. Contracts, etc., How Executed. Unless otherwise determined by the Board, the President or the Treasurer may enter into any contract or execute and deliver any contract or other instrument, the execution of which is not otherwise specifically provided for, in the name and on behalf of the Foundation. The Board, except as otherwise provided in these By-Laws, may authorize any other or additional officer, officers, agent or agents of the Foundation

to enter into any contract or execute and deliver any contract or other instrument in the name and on behalf of the Foundation and such authority may be general or confined to specific instances. Unless authorized to do so by these By-Laws or by the directors, no officer, agent or employee shall have any power or authority to bind the Foundation by any contract or engagement or to pledge its credit or render it liable pecuniarily for any purpose or in any amount.

SECTION 9.02. Checks, Drafts, etc. All of the Foundation's checks, drafts, bills of exchange or other orders for the payment of money, obligations, notes or other evidences of indebtedness, bills of lading, warehouse receipts and insurance certificates shall be signed or endorsed by such of the Foundation's officer, officers, employee or employees as shall from time to time be determined by Board resolution.

SECTION 9.03. Shares Held by Foundation. Any shares of stock issued by any corporation and owned or controlled by the Foundation may be voted at such corporation's shareholders' meeting by the Foundation's President or the Treasurer.

## ARTICLE X

## SEAL

The seal of the Foundation shall be in the form of a circle and shall bear the Foundation's name and the state and year of its incorporation.

## ARTICLE XI

## FISCAL YEAR

Except as from time to time otherwise provided by the Board, the Foundation's fiscal year shall commence on the 1st day of October of each year.

ARTICLE XII

MISCELLANEOUS

SECTION 12.01. Personal Liability. Directors and officers of the Foundation shall not be personally liable for any Foundation debt, liability or obligation. All persons, corporations or other entities extending credit to, contracting with or having any claim against the Foundation may look only to the Foundation's funds and property for the payment of any debt, damages, judgment or decree, or of any money that may otherwise become due or payable to them from the Foundation.

SECTION 12.02. Corporate Records. The original or attested copies of the Articles of Incorporation, these By-Laws, and records of all meetings of the Members and the Board and all of the Foundation's records, the names and the record addresses of all directors, Members and officers shall be kept in North Providence, Rhode Island, at the Foundation's principal office or at an office of its Secretary or Resident Agent. Said copies and records need not all be kept in the same office_ They shall be available at all reasonable times for the inspection of any director or officer for any proper purpose, but not to secure a list or other information for the purpose of selling said list or information or copies thereof or of using the same for a purpose other than in the interest of the director or officer relative to the Foundation's affairs. Except as otherwise may be required by law, the Articles or these By-Laws, the Foundation shall be entitled to treat a director's, Member's or officer's record address as shown on its books as the address of such person or entity for all purposes, including the giving of any notices and it shall be the duty of each such person or entity to notify the Foundation of his/her/its latest post office address.

SECTION 12.03. Evidence of Authority. A certificate by the Secretary as to any action taken by a director, officer or representative of the Foundation shall be conclusive evidence of

such action as to all who rely thereon in good faith.

SECTION 12.04. Ratification. Any action taken on behalf of the Foundation by a director, officer or representative of the Foundation which requires authorization by the directors shall be deemed to have been duly authorized if subsequently ratified by the directors retrospectively if action by them was necessary for authorization.

SECTION 1.01. Articles of Incorporation. All references in these By-Laws to the Articles shall be deemed to refer to the Articles, as amended, and in effect from time to time.

## ARTICLE XIII

## AMENDMENTS

Alterations and repeal of the By-Laws, and new By-Laws not inconsistent with the laws of the State of Rhode Island or with the Articles of Incorporation, may be adopted by the Foundation upon the authorization or approval by the Member after such alteration, repeal or new By-Law is proposed by a majority vote of the Board at any meeting at which a quorum shall be present. The proposed alteration or repeal or of the proposed new By-Laws shall be included in the notice of such Board meeting at which such alteration, repeal or adoption is acted upon.

659504.1

# EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN et al. | : | |
| Plaintiffs | : | |
| v. | : | C.A. NO.: 1:18-cv-00328-W |
| PROSPECT CHARTERCARE, LLC, et al.; | : | |
| Defendants. | : | |

**DEFENDANT CHARTERCARE FOUNDATION'S**
**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. Civ. P. 7.1(a), defendant CharterCARE Foundation ("CCF") states that it is a Rhode Island non-profit corporation that has not issued any stock, and accordingly, there is no publicly held corporation that owns 10% or more of CCF's stock.

With respect to whether or not CCF has a "parent corporation," there presently is a dispute regarding whether or not co-defendant CharterCARE Community Board ("CCCB") legally enjoys rights as the sole member of CCF. On August 25, 2011, CCF filed with the Rhode Island Secretary of State's Office Articles of Amendment to CCF's Articles of Incorporation stating, in relevant part, that CCCB was CCF's sole member. No amendment to that portion of CCF's Articles of Incorporation has been filed. CCF contends, however, that it has functioned independently of CCCB for the last three-to-four years. CCF further contends that, well before this action was filed, CCCB's legal rights as CCF's sole member effectively terminated due to waiver and/or abandonment.

This Rule 7.1(a) disclosure is not intended as a comprehensive brief regarding whether or not CCF currently has a "parent corporation." CCF reserves its rights to develop further factual and legal arguments regarding this issue.

CHARTERCARE FOUNDATION,

By its counsel,

/s/ Russell F. Conn

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Dated: September 20, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of September, 2018, I filed and served this document through the ECF filing system. This document is available for viewing and downloading from the ECF system, and the ECF system will automatically generate and send a Notice of Electronic Filing to the following Users of Record:

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# EXHIBIT 3

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 10/5/2018 3:03 PM
Envelope: 1746265
Reviewer: Alexa G.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.

vs.

ST. JOSEPH'S HEALTH PLAN OF RHODE ISLAND RETIREMENT PLAN, as amended

C.A. No: PC-2017-3856

# AFFIDAVIT

Benjamin Ledsham, upon due affirmation, hereby deposes and says:

1. I am counsel, along with Max Wistow and Stephen Sheehan, to the Receiver in the above captioned action.

2. On October 4, 2018, I visited the website of the Rhode Island Attorney General's Office of the Health Care Advocate at the URL http://www.riag.ri.gov/CivilDivision/OfficeoftheHealthCareAdvocate.php.

3. Appearing on that webpage, under the caption "Recent HCA Reviews" and the sub-caption "CharterCARE/Prospect", are web links labeled:

- "CharterCARE/Prospect Final Decision"
- "CharterCARE Initial Application"
- "CharterCARE/Prospect 1st Amendment to Asset Purchase Agreement"
- "Public Exhibits"
- "Additional Public Exhibits"

4. By following the web link for "Public Exhibits", I downloaded the compressed .ZIP archive located at http://www.riag.ri.gov/documents/CharterCareExhibits.zip.

5. This compressed .ZIP archive contained thirty seven folders with names corresponding to exhibit numbers. Among them is a folder named "Exhibit 10B".

6. Within the folder named "Exhibit 10B" were four .PDF files including one with the file name PHCA000074.pdf, which is bates stamped PHCA00074 through PHCA00097 and entitled *REVISED BY-LAWS OF CHARTERCARE HEALTH PARTNERS FOUNDATION Adopted on August 22, 2011 and revised on October 8, 2013*.

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Benjamin Ledsham

SUBSCRIBED AND AFFIRMED to before me this 5th day of October, 2018.

NOTARY PUBLIC
My Commission Expires: 9/5/21