Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 10/23/2018 5:49 PM
Envelope: 1769821
Reviewer: Alexa G.

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

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

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October 23, 2018

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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 in reply to the memorandum Prospect CharterCare, LLC ("Prospect Chartercare") has filed in support of its objection to the Receiver's motion to adjudge Prospect Chartercare in contempt (hereinafter "Prospect's Contempt Memo").

NEW EVIDENCE OF CONTEMPT SINCE THE FILING OF THE INSTANT MOTION

When it was filed, the Receiver's motion to adjudge Prospect Chartercare in contempt was based upon Prospect Chartercare's commencement of a proceeding before the Rhode Island Attorney General, by filing on September 27, 2018 its Petition for Declaratory Order [Pursuant to] R.I. Gen. Laws § 42-35-8, captioned *In the Matter of: Prospect CharterCARE, LLC before the Rhode Island Department of Attorney General* (the "Petition for Declaratory Order"), signed by Attorney Mark Russo on behalf of Prospect Chartercare.[1]

On October 22, 2018, however, Prospect Chartercare filed Prospect's Contempt Memo in which it disclosed for the first time that it has *also* filed a petition for declaratory relief with the Rhode Island Department of Health! In Prospect's Contempt Memo, Prospect Chartercare asserts that the petition it filed with the Department of Health is "on the legality of the transfer of interest that the Receiver's proposed Settlement

[1] As stated in his supporting memorandum, the Receiver only obtained the Petition for Declaratory Order because it was attached as Exhibit B to the memorandum ("Prospect's Memo re Settlement") filed in support of the Objection to the Receiver's Petition for Settlement Instructions of Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, Prospect Chartercare SJHSRI LLC, and Prospect Chartercare RWMC LLC. The Receiver still has not been formally served with that Petition for Declaratory Order.

contemplates." Prospect's Contempt Memo at 1. However, Prospect Chartercare has not provided the petition to the Receiver[2] or the Court.

Prospect Chartercare has not withdrawn its petitions for declaratory orders since the Receiver's motion to adjudge in contempt was filed, although it has had several weeks to do so. Not only has Prospect Chartercare failed to withdraw its petitions for declaratory orders, it makes cryptic comments suggesting it intends to appeal from the Attorney General's apparent rejection of Prospect Chartercare's petition for declaratory order. See Prospect Chartercare's Contempt Memo at 19 n.8. ("In any event, RIAG and RIDOH will eventually rule on the petitions and there are then, appellate rights.").

The Attorney General's rejection is based on the fact that the petition was filed with the Attorney General pursuant to R.I. Gen. Laws § 42-35-8, which is the section of the Administrative Procedures Act that provides that "[a] person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner." R.I. Gen. Laws § 42-35-8(a). However, in connection with the Receiver's Petition for Settlement Instructions, the Attorney General has advised the parties and the Court that the Administrative Procedures Act is inapplicable. See Reply of the Rhode Island Attorney General to Certain Parties' Objections to the Receiver's Petition for Settlement Instructions (the "Attorney General's Reply") at 3 (""[T]he defendants in this case cannot invoke the APA in seeking review of any aspect of the HCA Decision."). Moreover, according to the Attorney General, in addition to being procedurally invalid, the petition for declaratory order is also substantively

[2] Upon receipt of Prospect's Contempt Memo on Monday October 21, 2018, Special Counsel immediately emailed a letter to Prospect's counsel requesting a copy, but no response has been received.

improper because the doctrine of administrative finality upon which it is based does not apply to the Attorney General's actions in connection with hospital conversions. See Attorney General's Reply at 4 ("Despite the Prospect Entities' argument otherwise, the doctrine of administrative finality appears inapplicable to the instant circumstances for at least two reasons.").

Nevertheless Prospect Chartercare has made clear that it intends to proceed with its petitions for declaratory order, including seeking appellate review, unless the Court adjudges it in contempt and orders it to purge its contempt by withdrawing the petitions.

THE ORDER APPOINTING PERMANENT RECEIVER

On October 27, 2017, the Court (Stern, J.) entered an Order Appointing Permanent Receiver, which *inter alia* contained the following injunction:

> This cause came to be heard on October 27, 2017, on the Appointment of Permanent Receiver for the Respondent, and it appearing that the notice provided by the Order of this Court previously entered herein has been given, and upon consideration thereof, it is hereby
>
> ORDERED. ADJUDGED AND DECREED:
>
> * * *
>
> 15. **That the commencement, prosecution, or continuance of the prosecution, of** any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, **or any other proceeding**, in law, or in equity or **under any statute, or otherwise, against the Respondent or any of its assets or property,** by any creditor, corporation, partnership or any other entity or person, or the levy of any attachment, execution or other process upon or against any asset or property of the Respondent, **or the taking or attempting to take into possession any asset or property in the possession of the Respondent or of which the Respondent has the right to possession, or the cancellation at any time during the Receivership proceeding herein of any** insurance policy, lease or **other contract with the Respondent**, by any of such parties as aforesaid, other than the Receiver designated as aforesaid, **without obtaining prior**

> **approval thereof from this Honorable Court**, in which connection said Receiver shall be entitled to prior notice and an opportunity to be heard, **are hereby restrained and enjoined until further Order of this Court**.

Receiver's Memo Exhibit 2 (Order Appointing Permanent Receiver) (emphasis supplied). In short, the Order Appointing Permanent Receiver restrains and enjoins (1) the commencement of any proceeding against the Plan or the property of the Plan; (2) any interference with the Receiver's taking and retaining possession of any property of the Plan; and (3) the cancellation of any contract relating to the Plan, without obtaining prior approval from the Court.

ARGUMENT

I. Summary of Argument

Prospect's Contempt Memo displays a fundamental ignorance or intentional mischaracterization of the applicable law and facts, is based primarily on arguments that are totally irrelevant to whether it has violated the Order Appointing Permanent Receiver, and further demonstrates that its violation of the Court's Order was willful.

II. Prospect Chartercare Does Not Dispute it Had Actual Knowledge of the Order Appointing Permanent Receiver

As noted in the Receiver's memorandum in support of his motion to adjudge in contempt, "[a]ll of the Prospect entities have appeared through counsel in the Receivership Proceeding." Receiver's Memo at 3. Moreover, "[c]opies of the Order Appointing Permanent Receiver has subsequently been served on Prospect Chartercare from time to time in connection with various motion practice." [3] Receiver's

[3] For example, a copy of the Order Appointing Permanent Receiver is Exhibit 3 to the Respondent's Memorandum in Support of Its Motion to Compel Documents from St. Joseph Health Services of Rhode Island and for Monetary Sanctions, which was filed with the Court on December 20, 2017 and was

Memo at 21. Furthermore, on September 24, 2018, three days before commencing the Petition for Declaratory Order, counsel for the Receiver specifically warned counsel for Prospect Medical Holdings and Prospect East that commencing proceedings to contest the Settlement Agreement without first obtaining permission of the Court in the Receivership Action would be a contempt of the Order Appointing Permanent Receiver. See Affidavit of Max Wistow Sworn to on October 5, 2018 (Exhibit 5 to the Receiver's Memo) ¶ 3. That warning was confirmed in a letter to counsel electronically delivered on September 27, 2018, prior to Prospect Chartercare's filing of the Petition for Declaratory Order with the Court. Exhibit 6 to Receiver's Memo.

Notably absent from Prospect Chartercare's Contempt Memo is any denial of the fact that it filed the petitions for declaratory order with actual knowledge of the injunction against such actions set forth in the Order Appointing Permanent Receiver, or any denial that it was directly warned that commencement of any proceeding to interfere with the Settlement Agreement or the Receiver's rights thereunder would force the Receiver to file the instant motion to adjudge Prospect Chartercare in contempt. Thus it must be concluded that when it filed its petitions for declaratory orders, Prospect Chartercare intentionally chose to defy the Order of the Court.

III. The Receiver's Rights under the Settlement Agreement Are Property of the Receivership Estate

Prospect Chartercare claims that the Receiver's rights under the Settlement Agreement are not property of the Receivership Estate because the "proposed Settlement Agreement" is not a binding contract, since it is subject to court approval.

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concurrently electronically served by the Court on counsel for Prospect Chartercare. Such service constitutes service on Prospect Chartercare. See Super. R. Civ. P. 5(b).

Prospect's Contempt Memo at 14. That argument is incorrect both on the facts and on the law.

The Settlement Agreement is not a "proposed Settlement Agreement." To the contrary, it is an *actual* "Settlement Agreement." It is fully executed, has already transferred certain rights, and has already been partially performed. With respect to CCCB's 15% interest in Prospect Chartercare, the Settlement Agreement provides:

> 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.**

Settlement Agreement ¶ 17 (emphasis supplied). Thus, the Settling Defendants are *already* holding CCCB's 15% interest in trust for the Receiver, and are *currently* prohibited from assigning, transferring, or otherwise limiting or encumbering such rights or interests except with the express written consent of the Receiver.

Moreover, the Settlement Agreement obligates CCCB to exercise the put option at the request of the Receiver, if this Court and the Federal Court have not approved the settlement by June 19, 2019:

> 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.

Settlement Agreement ¶ 20 (emphasis supplied). Thus, even before final court approval is obtained, CCCB may be required by the Settlement Agreement to exercise the put option for the benefit of the Receiver.

Finally, the Settlement Agreement obligated the Settling Defendants to execute a security agreement giving the Receiver a security interest in all of their tangible and intangible property, and to file UCC-1s with the Rhode Island Secretary of State recording that interest. Settlement Agreement ¶ 29. That security agreement has been executed and delivered to the Receiver, and the UCC-1s have been filed with the Secretary of State. Receiver's Memo at 4.

Prospect Chartercare ignores these already-performed provisions of the Settlement Agreement, and contends that the Settlement Agreement is not a binding contract because the Settlement Agreement will become void if the Proposed Settlement is not finally approved. Prospect Chartercare argues as follows:

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

Prospect's Contempt Memo at 14. To bolster that argument, Prospect Chartercare cites the following language from Allen v. Marciano, 84 A.2d 425 (R.I. 1951):

> "The making and delivering of a writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent to its becoming obligatory. In such case it does not become operative as a contract until the performance or happening of the conditions precedent."

Prospect Contempt Memo at 14 (quoting Allen v. Marciano, *supra*, 84 A.2d at 428).

Of course, a contractual provision that states that a contract will become void upon the occurrence of a future event is a condition subsequent, not a condition

precedent. 17A C.J.S. Contracts § 451 ("Thus, a contract that is conditioned to become void on a specified event is one subject to a condition subsequent.") (citation omitted). As such, it does not affect the Settlement Agreement's validity as a binding contract. Id. ("The fact that a promise is made depending on a condition subsequent does not affect its validity. A condition subsequent does not delay the enforceability of a contract, as it only preserves the possibility that a contract can be set aside later in time if a condition is not fulfilled.") (citations omitted). Thus, Allen v. Marciano, 84 A.2d 425 (R.I. 1951), and the other cases cited by Prospect Chartercare that deal with conditions precedent are inapplicable.

After first describing court approval as a condition precedent (Prospect's Contempt Memo at 14), Prospect Chartercare acknowledges that "[t]he Receiver drafted the Settlement Agreement to have the Court's denial of the Settlement Agreement act as a condition subsequent, causing the Settlement Agreement to become null and void." Prospect's Contempt Memo at 15. Prospect Chartercare labels that draftsmanship "transparent" and a "sleight of hand," and asks the Court to nevertheless treat the requirement of court approval as a condition precedent:

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

Prospect's Contempt Memo at 15. As Prospect Chartercare should know, a court cannot re-write a contract. See A.F. Lusi Const., Inc. v. Peerless Ins. Co., 847 A.2d 254, 258 (R.I. 2004):

> A reviewing court has no need to construe contractual provisions unless those terms are ambiguous. *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I.1994). When the terms are clear and unambiguous, then the court should apply them as written. *Id.*

See also Pearson v. Pearson, 11 A.3d 103, 109 (R.I. 2011):

> We decline to read nonexistent terms or limitations into a contract. See *Perez v. Aetna Life Insurance Co.*, 150 F.3d 550, 557 (6th Cir.1998) ("[Per] the basic principle of contract law * * * courts are not permitted to rewrite contracts by adding additional terms."); *Morrisseau v. Fayette*, 164 Vt. 358, 670 A.2d 820, 826 (1995) ("[W]e affirm this construction of the contract as the most consistent with the unambiguous language and our obligation not to read additional terms into the contract.").

Nevertheless, Prospect Chartercare asks the Court to confuse the fundamental (indeed, hornbook) difference between a condition subsequent and a condition precedent.

Thus the Settlement Agreement and the Receiver's rights thereunder constitute "assets or property" already in possession of the Receivership Estate, and proceedings affecting the Settlement Agreement and the Receiver's rights thereunder are enjoined by the Order Appointing Permanent Receiver.

Moreover, even the Receiver's contract rights that are contingent are assets and property of the Receivership Estate. See 31 Williston on Contracts § 78:71 (4th ed.) ("Contract rights, even if they are contingent on some future event, become the property of the estate."). See also In re Taronji, 174 B.R. 964, 971 (Bank. N.D. Ill. 1994) ("When this case was filed, Jaime Taronji had a contract right to receive unrestricted Tenneco stock, contingent on his working for Tenneco companies until March 13, 1994. The contingency did not prevent this contract right from becoming property of the estate under Section 541(a)(1). Moreover, the stock itself was the proceeds of that contract right, and thus was includable in the estate under Section 541(a)(6).") (citing 29 U.S.C. § 541(a)(1) and 29 U.S.C. § 541(a)(6)).

IV. The Order Appointing Permanent Receiver Made No Exception for Declaratory Actions or Other "Novel Statutory proceedings"

Prospect Chartercare contends that its filings of the petitions for declaratory order did not violate the Court's Order Appointing Permanent Receiver because declaratory proceedings pursuant to the Administrative Procedures Act are "novel statutory proceedings" that are not enjoined by the Order Appointing Permanent Receiver. Prospect's Contempt Memo at 12 ("Utilizing the automatic stay in the bankruptcy context as an analogy, the automatic stay does not operate to prevent certain actions for declaratory relief.") (citing In re James Hunter Machines Co., 31 B.R. 528, 530 n.5 (Bankr. D. Mass. 1983)).

However, regardless of what the automatic stay encompasses, the Order Appointing Permanent Receiver clearly and expressly enjoined statutory and declaratory proceedings, by enjoining "the commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, or **any other proceeding**, in law, or in equity or **under any statute**, or otherwise, against the Respondent or any of its assets or property in any Court, **agency**, tribunal, or elsewhere, or before any arbitrator, or otherwise …." (emphasis supplied). The filing of the petitions for declaratory orders was clearly the commencement of a statutory proceeding with an agency.

Moreover, the general rule is that the automatic stay applies to actions for declaratory and injunctive relief. As the court stated in In re Enron Corp., 306 B.R. 465 (Bankr. S.D.N.Y. 2004):

> This Court is persuaded by other cases holding that section 362(a)(1) of the Code applies to the continuation or commencement of declaratory

> judgment actions against the debtor. *See Commercial Union Ins. Co. v. Johns–Manville Corp. (In re Johns–Manville Corp.)*, 31 B.R. 965, 970 (S.D.N.Y.1983) (distinguishing interpleader actions and affirming bankruptcy court's conclusion that automatic stay applied to pending declaratory judgment action); *Advanced Computer Servs. v. MAI Sys. Corp.*, 161 B.R. 771, 774–75 (E.D.Va.1993) (concluding that automatic stay applied to complaint filed post petition seeking declaratory and equitable relief).

In re Enron Corp., *supra*, 306 B.R. at 471 (applying the automatic stay to bar a state court action for a declaration "as to whether a swap agreement is valid at all or, alternatively, as to when the swap was properly terminated").

On the other hand, the case Prospect Chartercare cites for the proposition that the automatic stay may not apply to declaratory actions, In re James Hunter Machines Co., 31 B.R. 528 (Bankr. D. Mass. 1983), did not even involve a request for declaratory or injunctive relief, but, rather, concerned the stay of state court product liability actions for damages. See In re James Hunter Machines Co., *supra*, 31 B.R. at 528-529. The court merely distinguished that situation with which it was confronted, from the situation another court faced concerning the automatic stay and claims for declaratory relief. See In re James Hunter Machines Co., *supra*, 31 B.R. at 529 & 529 n.5 ("The district court, in that case, recognized that certain types of actions are generally not stayed (e.g. those which seek declaratory or injunctive relief.") (citing Paden v. Union for Experimenting Colleges and Universities, 7 B.R. 289, 290 (Bankr. N.D. Ill. 1980)).

Paden does not help Prospect Chartercare, since it simply stands for the proposition that the stay may be lifted for actions that do not interfere with the bankruptcy. See Johns-Manville Corp. v. Asbestos Litig. Grp. (In re Johns-Manville Corp.), 40 B.R. 219, 223 (S.D.N.Y. 1984) ("Similarly, in *Paden v. Union for Experimenting Colleges and Universities*, 7 B.R. 289 (D.C. N.D. Ill. 1980), another of the cases referred to by Lake, the court permitted discovery to proceed against the debtor

in a civil rights case after finding that this would not interfere with pending bankruptcy proceedings."). To the contrary, Paden indicts the manner in which Prospect Chartercare has proceeded, because in Paden the court held that a party seeking declaratory relief must first apply to the court for relief from the stay, not simply disregard it as has Prospect Chartercare. See Paden, *supra*, 7 B.R. at 292 ("Although we believe that a Title VII suit should be exempted from a stay order, the proper procedure is to seek a lifting of the stay from the Ohio bankruptcy court.").

Thus, all Paden stands for is that in a hypothetical scenario in which Prospect Chartercare a) *first* asked the Court for relief from the injunction against proceedings, and b) provided that the actions Prospect Chartercare proposed to commence *would not have interfered with the Receivership Estate*, then Prospect Chartercare might have been granted relief. That does not absolve it from being adjudged in contempt for violating the order. We have found (and Prospect Chartercare has cited) no case involving the automatic stay or injunction in which a court approved the commencement or continuation of a declaratory judgment proceeding, *without there first having been a motion for relief from the stay or injunction*. To the contrary, even the cases cited by Prospect Chartercare upon examination establish the requirement of prior application for relief from the stay or injunction before a party subject to the stay or injunction may commence a separate proceeding.

V. The Petitions for Declaratory Orders Interfere With The Receivership

Prospect Chartercare seeks to minimize the impact of the petitions for declaratory orders on the Settlement Agreement:

> The Petitions do not seek to invalidate the Settlement Agreement; they ask for a determination as to the preclusive effect of the final HCA and CEC decisions, and whether the transfer being proposed or purportedly

> undertaken by the Receiver under the Settlement Agreement is a "conversion."

Prospect's Contempt Memo at 11.

That is a clear and deliberate mischaracterization of the petition filed with the Attorney General. That petition states, *inter alia*:

> 27. **Thus, the transfer of ownership and voting interests proposed by the Receiver to advance the Settlement is in violation of the Conversion, at variance with the HCA and the HLA, and at variance the determinations embodied within final agency decisions that the Acquiror has no liability for the Plan**.
>
> 28. Accordingly, as pursuant to R.I. Gen. Laws §42-35-8, if the HCA and HLA are properly interpreted and applied, and the Final Conversion and CEC Decisions are properly applied to the Petitioner, **the transfer proposed by the Receiver in furtherance of the Settlement would not be allowed without review and approval by the Department of Health and the Department of Attorney General.** In turn, if an application for administrative review and approval were property submitted by the Receiver, the administrative agencies would be required to reject the application based upon the doctrine of administrative finality.
>
> 29. **Finally and of critical importance, the transfer proposed by the Receiver to advance the Settlement seeks to re-attach the Plan and Plan liability to the ownership and operation of the Hospitals and it is based, in large part, upon the allegations in the Federal Court Litigation that the Acquiror has liability for the Plan. However, said cause of action in the Federal Court Litigation as against the Acquiror is barred by the doctrine of res judicata and said bar should be enforced by the agencies with jurisdiction over the Conversion and CEC Proceedings**.
>
> * * *
>
> 46. On or about September 4, 2018, the Receiver petitioned the Receivership Court to grant the Receiver authority to enter into what is defined above as the Settlement with SJHSRI and the other Transacting Parties on the Acquiree's side of the Conversion, by having the Acquiree transfer its fifteen (15%) percent interest and fifty (50%) percent voting authority in Prospect CharterCARE, LLC to the Receiver. The Settlement, if hypothetically approved, would transfer the Acquiree's interest and voting authority in the Prospect CharterCARE, LLC to the Receiver as a vehicle to address Plan liability. Thus, the Receiver, through the proposed Settlement, seeks to re-attach the Plan to the Hospitals, post-Conversion, which violates the Final Conversion and CEC Decision.

47. Accordingly, the Petitioner seeks a declaratory order as follows:

a. If the HCA and HLA are properly interpreted and applied and/or the Final Conversion and CEC Decisions are properly applied to the Petitioner, the transfer proposed by the Receiver to advance the Settlement violates the HCA and HLA, as it is at variance with the Final Conversion and CEC Decisions. **Thus, the Receiver would have to apply to the administrative agencies with jurisdiction for relief**;

b. If the HCA and HLA are properly interpreted and applied, the transfer proposed by the Receiver to advance the Settlement is a "conversion" as defined by §4(6) of the HCA, as it would result in the transfer of more than 20% of the voting control of the Acquiror. **Thus, the Receiver could not effectuate such a conversion without application to, review, and approval by the Departments of Health and/or the Department of Attorney General**;

c. If the Receiver applied to modify the Final Conversion and/or CEC Decisions, or applied for the review and approval of the proposed conversion embodied within the Settlement, the Receiver's application would be barred by the doctrine of administrative finality; and

d. **The Receiver's cause of action in the Federal Court Litigation alleging Plan liability as against the Acquiror is barred by the doctrine of res judicata and the bar should be enforced in the first instance by the administrative agencies with jurisdiction over the Conversion and CEC Proceedings**.

Receiver's Memo Exhibit 7 (Petition for Declaratory Order) (emphasis supplied).

The petition thereafter proceeds to ask the Attorney General for four "Request[s] for Declaratory Order", ultimately concluding with:

73. The Final Conversion and CEC Decisions were final agency decisions that were never appealed and thus, the claims in the Federal Court Litigation that the Acquiror and/or its affiliates are somehow liable for the Plan are barred by the doctrine of res judicata and that bar should be enforced by the administrative agencies with jurisdiction over the Conversion and CEC Proceedings.

Id. (Exhibit 7) at 21.

As recited above, Prospect Chartercare has commenced an administrative proceeding before the Attorney General to obtain an adjudication of various issues including: (1) that the Receiver's rights under the Settlement Agreement concerning a transfer of membership in Prospect Chartercare are invalid; (2) that the Receiver cannot proceed with the Settlement Agreement without completing a new administrative proceeding under the Hospital Conversions Act; (3) that the Receiver is conclusively bound by various prior alleged administrative findings by *res judicata*, including the alleged "finding" that the Prospect Defendants are not liable for funding the Pension Plan; and (4) that the Receiver is conclusively bound by various judicial admissions allegedly made in the Petition for Receivership filed in Superior Court, including the alleged "admission" that the Prospect Defendants are not liable for funding the Pension Plan.

Thus, Prospect Chartercare most certainly intends that the petitions for declaratory orders interfere with the Receivership Proceedings, and, indeed, preclude the Receiver from pursuing claims on behalf of the Receivership Estate.

VI. The Receiver is Not Estopped From Relying on the Court's Injunction

Prospect Chartercare contends that the Receiver's assertion of claims against Prospect Chartercare and others either constitutes a waiver of the Court's injunction against actions commenced by Prospect Chartercare, or is grounds for holding that the Receiver is "equitably estopped' from relying on the injunction. Prospect's Contempt Memo at 21-22.

This is another frivolous argument with which Prospect Chartercare burdens the Court and the Receiver. The Order Appointing Permanent Receiver certainly does not contain an exception for separate lawsuits claims asserted by an entity against whom

the Receiver has brought suit. Nor in fairness should it have, since that would greatly interfere with the administration of the Receivership Estate. Moreover, Prospect Chartercare does not allege that it needs such an exception to make the arguments it seeks to make to the Attorney General and the Department of Health. Prospect Chartercare might have obtained approval from the Court to commence those proceedings if Prospect Chartercare had sought such approval before filing the actions. Moreover, Prospect Chartercare does not (and cannot) dispute that even if it had applied to the Court and the Court had denied leave to bring the proceedings before the Attorney General and the Department of Health, that Prospect Chartercare nevertheless could assert all of those arguments, in defense of the Receiver's claims in the Federal Court Action.

Prospect Chartercare cites no authority whatever for the proposition that an injunction against separate suits by an entity is waived once the Receiver sues the entity. The only case it does cite, In re Mid-City Parking, Inc., 332 B.R. 798, 820 (Bankr. N.D. Ill. 2005), merely stands for the proposition that when a trustee or debtor-in-possession files a notice of appeal in a state court action that would otherwise be halted by the automatic stay, the automatic stay is waived to the extent of allowing the appellee to *respond to the appeal in that case*. See In re Mid-City Parking, Inc., *supra*, 332 B.R. at 820 ("It goes without saying that once a trustee or debtor-in-possession unilaterally waives the protections of the automatic stay by proceeding with estate administration, he cannot contend that a creditor-appellee has violated the automatic stay by opposing the appeal he himself has initiated and prosecuted."). That might be applicable if the Receiver in the Federal Court Action contended that the Order Appointing Permanent Receiver prohibited the defendants in that action from defending

themselves. The Receiver has no intention of making such an argument, which in any event is not the situation here.

Although the court in Mid-City Parking also noted that "from an equitable standpoint, one court has held that the debtor-in-possession is estopped from asserting the stay against a creditor-appellee once it has initiated an appeal in the face of §362(a)," Mid-City Parking, *supra* (citing In re Horkins, 153 B.R. 793, 799 (Bankr. M.D. Tenn. 1992),) that latter case also held that a party may respond to an appeal initiated by the debtor without violating the automatic stay. In re Horkins, *supra*, 153 B.R. at 799 (Bankr. M.D. Tenn .1992).

In short, we have not found (and Prospect Chartercare does not cite) a single case in which a receiver or trustee's commencement of a claim against an entity entitled that entity to bring a separate action involving the property of the estate, without seeking relief from the automatic stay or a state court injunction against separate actions. The Court certainly should not create such a rule here, since that would interfere with the Receivership Estate and is not required for Prospect Chartercare to make its arguments.

VII. The Petitions for Declaratory Orders Are Not Before the Court

The merits of the petitions for declaratory orders are not before the Court. Indeed, Prospect Chartercare has not even provided the Court or the Receiver with the petition it filed with the Department of Health. However, the fundamental reason the merits are not before the Court is that this is a motion to adjudge Prospect Chartercare in contempt for violating the Court's injunction, not a motion by Prospect Chartercare asking the Court to lift the injunction to permit these filings. For purposes of the motion to adjudge in contempt, it is irrelevant whether actions commenced in violation of the

Court's order have any merit. In other words, the injunction and automatic stay apply to bar separate actions without court approval, regardless of whether the separate actions have merit or are frivolous. Otherwise, the automatic stay and such injunctions would be rendered essentially meaningless, since they would be violated and separate proceedings commenced with impunity whenever the violator had grounds for a separate action.

Similarly, it is irrelevant even if Prospect Chartercare argued that the injunction in the Order Appointing Permanent Receiver was improper or even unconstitutional. See Matter of Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986) modified, 820 F.2d 1354 (1st Cir. 1987) ("Equally well-established is the requirement of any civilized government that a party subject to a court order must abide by its terms or face criminal contempt. Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified.").[4]

Prospect Chartercare ignores this crucial distinction, and attempts to make this a dispute between the Receivership Proceedings and regulatory review of hospital conversions, as shown in the following excerpt from Prospect's Contempt Memo:

> It is extraordinary that the Receiver would take the position that Prospect is precluded from seeking, and indeed is in contempt, merely for having sought the input of the Rhode Island Department of Attorney General ("RIAG") and the Rhode Island Department of Health ("RIDOH") on the legality of the transfer of interest that the Receiver's proposed Settlement Agreement contemplates. In doing so, the Receiver has taken a wholly unsupportable position in which the order placing the pension plan into receivership and appointing the Receiver is somehow transformed from a shield against litigation into a sword by which the Receiver's actions

[4] Although it is completely inapplicable here, for sake of completeness we note that this rule is subject to one exception: "A party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it." Matter of Providence Journal Co., *supra*, 820 F.2d at 1344.

> cannot be subject to review by anybody other than this Court. Actively attempting to prevent regulatory review in such a highly-regulated area as hospital ownership, makes this matter even more astounding. It certainly was not the intent of this Court to divest the RIAG and the RIDOH of their regulatory authority and the Receiver's efforts to hold Prospect in contempt for seeking such review and input should be soundly rejected.

Prospect's Contempt Memo at 1-2. See also Prospect's Contempt Memo at 20 ("The Receiver should not be allowed to use the injunctive provision of the Receivership Order as a 'sword' to prevent that regulatory process from proceeding. Prospect has every right to seek a declaration from the relevant administrative agency - indeed, the Receiver should be ordered by this Court to participate in that process.").

This argument ignores the fact that the injunction is not a *per se* bar to Prospect Chartercare commencing other actions. Rather, it barred Prospect Chartercare from commencing other actions without first having obtained the Court's approval. It was Prospect Chartercare that chose not to seek leave of the Court to file its petitions with regulatory agencies. If Prospect Chartercare had wanted to take what it labels as the "sword" of the injunction out of the Receiver's hands, it was entitled to apply to the Court.

Prospect Chartercare's claims that the Department of Health and the Attorney General are the appropriate agencies to determine the Receiver's rights ignores the fact that the property and assets of the Receivership Estate are *in custodia legis*. "No one may enforce a right to specific property in the possession of the receiver except on application to the court which appointed him, the property being in the custody of the court and immune from interference without permission of the court." Devine v. Cordovado, 15 Alaska 232, 243 (D. Alaska 1954); Ex Parte Tyler, 149 U.S. 164, 182 (1893) ("The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is

punishable as a contempt, is conceded…"). See also Rhode Island Hosp. Tr. Co. v. Rhode Island Covering Co., 182 A.2d 438, 441 (R.I. 1962) ("A receiver is an officer of the court that appointed him, and property entrusted to such a receiver is in the custody of that court to be disposed of only according to its order and in accordance with the priorities of the parties concerned."); Chafee v. Quidnick Co., 13 R.I. 442, 448 (R.I. 1881) ("A receiver is the hand of the court to take and hold property in dispute until it can be determined to whom it belongs.").

Interference with the Receivership Estate is a contempt even when it involves property over which the Receiver has not yet taken possession. Hazelrigg v. Bronaugh, 78 Ky. 62, 63 (1879) ("The Court will not permit any one, without its sanction and authority be first obtained, to intercept or prevent payment to its receiver of anything which he has been appointed to receive, though it may not be actually in his hands."). In other words:

> Sound administration of a receivership demands that assets of a company under receivership [here the Retirement Plan] be viewed as under the exclusive control of the receivership court (i.e., in *custodia legis*) and that there be no unwarranted interference with the receiver's actions or with the property which the receiver is charged to administer.

In re Indian Motocycle Co., Inc., 266 B.R. 243, 259 (Bankr. D. Mass. 2001).

VIII. To the Extent It Can Be Determined, the Petitions are Meritless

As noted, the merits of the petitions for declaratory orders are irrelevant to the motion to adjudge in contempt, and Prospect Chartercare has not even provided the Court or the Receiver with the petition it filed with the Department of Health. Nevertheless, since Prospect Chartercare has burdened the Court with its arguments as to why CCCB's transfer to the Receiver of its 15% interest in Prospect Chartercare violates the Hospital Conversions Act, the Court should consider that the Attorney

General makes no such claim in connection with the Receiver's Petition for Settlement Instructions. See The Receiver's Reply to Objections to the Receiver's Petition for Settlement Instructions, in which the Receiver makes the following observation:

> 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.

Id. at 52 (emphasis supplied).

What is even more significant is that Prospect Chartercare completely ignores the Receiver's detailed exposition in his memorandum in support of his motion to adjudge Prospect Chartercare in contempt of the many reasons why the petitions for declaratory orders are completely meritless, including the point that the transfer of the 15% interest does not violate the Hospital Conversions Act, because it adheres to the transfer requirements in the limited liability agreement approved by the Attorney General in connection with the 2014 conversion. See Receiver's Memo at 16-20. Prospect Chartercare's failure to even acknowledge, much less address, the Receiver's contentions and arguments demonstrates how pretextual and insincere Prospect Chartercare's argument really is.

IX. Prospect Chartercare's Judicial Admission Argument Demonstrates Ignorance of the Facts

Prospect Chartercare makes several arguments on the merits of the Receiver's claims against it in the Federal Court Action, none of which are even remotely or indirectly relevant to the motion to adjudge in contempt. They also display fundamental

ignorance of the facts. For example, Prospect Chartercare makes the following argument:

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

Prospect's Contempt Memo at 18 (emphasis supplied). The motion to adjudge in contempt is not affected by whether or not the Receiver is bound by the statements in the Petition for receivership. However, as Prospect Chartercare and its counsel certainly should know by now, if only by reading the caption of this case, the Petitioner and the entity being petitioned into receivership are not the same. The Petitioner is St. Joseph Health Services of Rhode Island ("SJHSRI"). The entity in receivership is the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan").

Not only are they two different entities, the Receiver asserts on behalf of the Plan that SJHSRI commenced the Receivership as the final step in a fraudulent scheme to transfer assets beyond reach of the Plan.[5] The Receiver also asserts that SJHSRI and the other defendants in the Federal Court Action, including Prospect Chartercare, all participated in that fraudulent conspiracy, such that any statements made by SJHSRI in the Petition pursuant to that conspiracy are imputed to Prospect Chartercare, not to the

[5] See Plaintiffs' First Amended Complaint in the Federal Court Action ¶ 55(d)(iv) (" Finally, having accomplished their goal of stripping SJHSRI of virtually all value, SJHSRI and its affiliates sought to wash their hands of the problem they created, and put the Plan into receivership in August of 2017 and asked the state court to reduce SJHSRI's liabilities to Plan participants by 40% on the grounds that SJHSRI had insufficient assets to fund the Plan.").

Plan.[6] Thus, although the Receiver is not bound by SJHSRI's statements, Prospect Chartercare may be.

X. Prospect Chartercare's Factual Recitals Are Completely Unsubstantiated

Most of Prospect's Contempt Memo is devoted to factual assertions. See Prospect's Contempt Memo at 3-8. Most of these are controversial to say the least, such as the assertion that if the Prospect entities did not acquire the hospitals and the Plan was not orphaned with a mere additional $14 million the hospitals would have failed. Prospect Contempt Memo at 7 ("If not, there would still exist issues with Pension Plan funding and the Hospitals would have failed."). To the contrary, as alleged by the Receiver in the Federal Court Action and the State Court Action, there were other potential purchasers, including a hospital chain that wanted to fund the Plan with $72 million.[7]

Moreover, Prospect Chartercare provides no substantiation for its factual assertions. Instead, Prospect Chartercare contends that "[t]he factual statements in this introductory section are public record and are set forth in Conversion and CEC dockets

[6] See Plaintiffs' First Amended Complaint in the Federal Court Action ¶ 504 ("Defendants SJHSRI, RWH, CCCB, CC Foundation, Angell, Prospect Chartercare, Corporation Sole, Diocesan Administration, Diocesan Service, Prospect East, Prospect Medical Holdings, Prospect Chartercare St. Joseph, and Prospect Chartercare Roger Williams participated in a conspiracy to injure the Plaintiffs, which involved the combination of two or more persons to commit an unlawful act or to perform a lawful act for an unlawful purpose.") and ¶ 338 ("The applicants seeking regulatory approval for the 2014 Asset Sale included SJHSRI, RWH, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East. They all participated in a common fraud and conspiracy to deceive state regulators, the general public, SJHSRI's employee unions, SJHSRI's employees, and all other Plan participants in order to proceed with the 2014 Asset Sale, in which they were aided and abetted by their co-conspirators Defendants Angell, CC Foundation, Corporation Sole, Diocesan Administration, and Diocesan Service. Accordingly, the actions of any of them in furtherance of their common fraud and conspiracy are imputed to them all.").

[7] See Plaintiffs' First Amended Complaint in the Federal Court Action ¶¶ 100-103.

which have all been subpoenaed and reviewed by the Receiver." Prospect's Contempt Memo at 3 n.3 (referring to hundreds of thousands of pages of documents). That is not how a party proves a fact. As noted, the Receiver disputes many of the factual assertions. However, even if they were true, none of the facts alleged by Prospect Chartercare have any bearing whatsoever on the issues raised by the receiver's motion to adjudge in contempt. Indeed, not even Prospect Chartercare alleges that these facts somehow entitled it to violate the Court's injunction. Accordingly, the Court should completely disregard these factual assertions.

XI. Prospect Chartercare's Requests That the Court Order the Receiver to Participate in the Administrative Proceedings Commenced by Prospect Chartercare Are Improper and Bizarre

Prospect Chartercare on several occasions asks the Court to order the Receiver to participate in the administrative proceedings that Prospect Chartercare has allegedly[8] commenced. See, e.g., Prospect's Contempt Memo at 8 ("Although the Receiver is seeking to hold Prospect in contempt for having instituted these regulatory reviews, this Court should instead order the Receiver to participate in them fully in recognition of the important role of the state regulators in overseeing and implementing the Legislature's directive and intent in the HCA and to prevent an unreviewed transfer of interest along the lines that the Receiver has purported to effectuate.").

However, Prospect Chartercare knows how to file a motion with Court if it seriously seeks such relief. It is improper and inappropriate to make such requests in connection with the motion to adjudge Prospect Chartercare in contempt. Is the

[8] "Allegedly" because the Attorney General has apparently rejected Prospect Chartercare's petition, and neither the Court nor the Receiver have even been provided with a copy of the petition Prospect Chartercare claims it filed with the Department of Health.

Receiver expected in this reply memorandum to object to that request, and explain why it would be improper even if made in the correct procedural context?

That request, along with many of Prospect Chartercare's other arguments that are completely irrelevant to this motion, raise the question whether even now Prospect Chartercare is taking this motion seriously, or, instead, is using it as another opportunity to multiply the proceedings in an effort to grind down the Receiver and Special Counsel. Certainly Prospect Chartercare has not attempted to purge itself of contempt. Instead it has doubled down on its disregard for the Court's injunction in the Order Appointing Permanent Receiver. We submit that Prospect Chartercare is leaving the Court with little choice other than to impose substantial damages on Prospect Chartercare, including attorneys' fees, in addition to merely finding Prospect Chartercare in contempt.

CONCLUSION

Accordingly, the Receiver respectfully requests that the Court adjudge Prospect CharterCare, LLC in contempt of the Court's Order Appointing Permanent Receiver. The Receiver respectfully requests that the Court hold Prospect CharterCare, LLC in contempt of court, compel Prospect CharterCare, LLC to withdraw its Petitions for Declaratory Orders, award the Receiver attorneys' fees and costs, and award such other and further relief as the Court may direct.

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CERTIFICATE OF SERVICE

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