UNITED STATE 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-WES-LDA
PROSPECT CHARTERCARE, LLC, ET AL.	:	
Defendants.	:	

SUPPLEMENTAL DECLARATION OF MAX WISTOW IN SUPPORT OF JOINT MOTION FOR SETTLEMENT CLASS CERTIFICATION, APPOINTMENT OF CLASS COUNSEL, AND PRELIMINARY SETTLEMENT APPROVAL, BY PLAINTIFFS AND DEFENDANTS CHARTERCARE FOUNDATION, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD

Max Wistow, Esq. hereby declares and states as follows:

1. I am counsel, along with Stephen Sheehan and Benjamin Ledsham, for Plaintiffs in the captioned matter, and submit this declaration in support of the Joint Motion for Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval ("Settlement B"), by Plaintiffs and Defendants CharterCARE Foundation ("CCF"), CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (collectively the "Settling Defendants") (Plaintiffs and the Settling Defendants being referred to

collectively as the "Settling Parties"), and Plaintiffs' Counsel's Motion for Attorneys' Fees.

2. This Supplemental Declaration supplements my Declaration of November 21, 2018 submitted in connection with an earlier proposed settlement among Plaintiffs, CCCB, SJHSRI, and RWH ("Settlement A").

3. On September 13, 2018, the Superior Court conducted a hearing on Plaintiffs' motion to intervene in *In re: Chartercare Health Partners Foundation, Roger Williams Hospital, and St. Joseph Health Services of Rhode Island*, KM-2015-0035 (R.I. Super.) (the "Cy Pres Action"). The transcript of this hearing is attached hereto as Exhibit 1.

4. On September 17, 2018, the Superior Court issued a bench decision in the Cy Pres Action. The transcript of this bench decision is attached hereto as Exhibit 2.

5. On October 2, 2018, the Superior Court issued a written order regarding the September 17, 2018 bench decision. This order is attached hereto as Exhibit 3.

6. On November 28, 2018, the Receiver filed his Petition for Settlement Approval regarding Settlement B with the Rhode Island Superior Court. The petition is attached hereto as Exhibit 4.

7. On December 10, 2018, attorney Arlene Violet filed a Miscellaneous Motion with the Superior Court on behalf of her clients in support of Petition for Settlement Approval regarding Settlement B. This filing is attached hereto as Exhibit 5.

8. The Petition for Settlement Approval was heard on December 14, 2018. The transcript of that hearing is attached hereto as Exhibit 6.

9. On December 27, 2018, the Rhode Island Superior Court, Stern, J., granted the Receiver's Petition for Settlement Approval and authorized and directed the Receiver to proceed with Settlement B. That order is attached hereto as Exhibit 7.

10. During settlement negotiations, CharterCARE Foundation disclosed to Plaintiffs that its assets total investment assets as of August 31, 2018 were $9,108,334.

11. Since this action was commenced on June 18, 2018, attorneys at WSL have devoted a minimum of 1,350 hours of time in prosecuting the claims of the Receiver and the Plaintiffs.

12. Those expenditures of time remain ongoing, even as to the pending settlements. By way of example, non-settling Defendants have filed motions to dismiss the First Amended Complaint (including memoranda of law totaling 291 pages and exhibits totaling 519 pages), to which responses are due February 4, 2019. See Dkt ## 67 – 70. Non-settling Defendants have also filed objections to Settlement A (including memoranda of law totaling 59 pages and exhibits totaling 175 pages), to which responses are due January 21, 2019. See Dkt ## 73-75. In addition, on January 2, 2019, Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and Prospect CharterCare, LLC informed the Superior Court that they intend to bring suit in Delaware to invalidate the consideration being received by the Receiver and Plaintiffs in Settlement A, and informed the Superior Court that they will again petition the Rhode Island Attorney General and the Rhode Island Department of Health to declare Settlement A illegal under state law. A copy of their January 2, 2019 filing is attached hereto as Exhibit 8.

13. Since this action was commenced on June 18, 2018, Plaintiffs have incurred nontaxable costs of $19,924.41.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 4th of January, 2019 in Rhode Island.

Max Wistow

Exhibit 1

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

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

MOTION TO INTERVENE

HEARD BEFORE ASSOCIATE JUSTICE BRIAN P. STERN ON:

THURSDAY, SEPTEMBER 13, 2018

APPEARANCES:

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

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

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

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

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

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

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

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

CERTIFICATION

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

JENNIFER W. MILETTE, RPR
Certified Official Court Reporter

THURSDAY, SEPTEMBER 13, 2018

MORNING SESSION

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

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

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

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

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

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

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

MR. DENNINGTON: Andrew Dennington for CharterCARE Foundation.

MR. CONN: Russell Conn, CharterCARE Foundation.

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

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

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

Counsel for the movant.

MR. SHEEHAN: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

basis for fraudulent transfer.

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

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

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

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

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

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

THE COURT: That's fine.

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

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

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

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

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

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

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

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

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

And if I may, your Honor?

THE COURT: Thank you.

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

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

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

What my brother's argument would be is that insofar

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

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

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

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

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

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

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

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

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

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

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

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

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

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

control it.

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

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

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

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

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

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

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

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

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

And if I may, your Honor?

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

Now if my brother is right, this whole transaction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now is that res judicata?

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

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

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

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

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

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

So there is the impairment of our interests, your

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

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

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

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

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

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

MR. SHEEHAN: Very good, your Honor.

THE COURT: -- have been applied.

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

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

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

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

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

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

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

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

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

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

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

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

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

The answer is zero prejudice. They did not show any

and they can't show any.

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

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

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

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

interests.

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

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

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

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

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

THE COURT: Thank you very much, Counsel.

Counsel, good morning. You may proceed.

MR. CONN: Thank you, your Honor.

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

(Pause)

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

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

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

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

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

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

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

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

go down.

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

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

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

MR. CONN: Okay. Thank you.

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

MR. CONN: Right.

THE COURT: You may certainly go ahead.

MR. CONN: I get that, your Honor.

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

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

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

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

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

MR. CONN: Right.

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

MR. CONN: We --

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

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

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

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

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

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

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

THE COURT: I saw that.

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

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

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

summary judgment for defendant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

restrict that gift.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CONN: Right.

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

MR. CONN: Okay.

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

MR. CONN: All right.

THE COURT: If you want to --

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

THE COURT: That's fine. Thank you.

MR. CONN: To speed this along.

THE COURT: Thank you, Counsel.

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

MR. WISTOW: May we see them?

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

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

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

I will talk a little bit about the timeliness issue.

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

could be re-visited at another point.

Do you know what I'm saying?

MR. CONN: I don't actually.

THE COURT: You don't?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

MR. CONN: Correct. Correct.

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

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

MR. CONN: Correct. Correct.

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

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

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

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

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

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

THE COURT: And I understand that.

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

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

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

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

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

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

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

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

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

United States of America will stand behind any pension shortfall.

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

MR. CONN: Correct.

THE COURT: Okay. Very good.

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

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

Anything else, Counsel?

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

THE COURT: Thank you very much.

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

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

MR. CONN: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

MR. SHEEHAN: Sure.

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

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

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

MR. SHEEHAN: Yes.

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

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

THE COURT: Right.

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

THE COURT: I understand.

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

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

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

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

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

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

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

basis to give it any deference.

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

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

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

We felt and continue to feel it was unseemly to ask

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

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

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

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

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

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

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

That's all I have, your Honor.

THE COURT: Thank you.

Counsel?

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

THE COURT: Go ahead.

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

MR. CONN: --

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

MR. CONN: Thank you.

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

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

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

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

court order.

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

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

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

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

The Court will set down this matter for next week

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

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

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

Counsel, thank you very much.

Court is in recess.

(A D J O U R N E D)

* * * * * * * *

Exhibit 2

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

PROVIDENCE, SC. SUPERIOR COURT

IN RE: CHARTERCARE HEALTH) CASE #: KM-2015-0035
PARTNERS FOUNDATION)

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON SEPTEMBER 17, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE.....THE RECEIVER
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL
STEPHEN SHEEHAN, ESQUIRE.....FOR RECEIVER
DAVID MARZILLI, ESQUIRE.....ATTORNEY GENERAL
SCOTT BELIECKI, ESQUIRE..... FOR CHARTERCARE
ANDREW DENNINGTON, ESQUIRE.....FOR CHARTERCARE
BENJAMIN LEDSHAM, ESQUIRE.....FOR RECEIVER

GINA GIANFRANCESCO GOMES
COURT REPORTER

CERTIFICATION

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 14, inclusive, are a true and accurate transcript of my stenographic notes.

Gina Gomes

GINA GIANFRANCESCO GOMES
COURT REPORTER

MONDAY, SEPTEMBER 17, 2018

MORNING SESSION

THE COURT: Madam Clerk, if you would call the case.

THE CLERK: Your Honor, the matter before the Court is KM-2015-0035, In Re: CharterCARE Health Partners Foundation. This is on for a bench decision regarding the motion to intervene. Would counsel please identify themselves for the record.

MR. DEL SESTO: Stephen Del Sesto, the Receiver to the plan.

MR. WISTOW: Max Wistow, counsel for the Receiver.

MR. SHEEHAN: Steven Sheehan, counsel for the Receiver.

MR. MARZILLI: Good morning, your Honor. David Marzilli on behalf of the attorney general.

MR. BELIECKI: Good morning, your Honor. Scott Beliecki for CharterCARE Foundation.

MR. DENNINGTON: Andrew Dennington for CharterCARE Foundation.

MR. LEDSHAM: Benjamin Ledsham also for the Receiver.

THE COURT: This matter is on today for a bench decision based on the documents and memorandums filed by the parties and the oral argument last week.

This proceeding arose out of a 2014 Asset Purchase

Agreement involving the ownership and control of two hospitals, Roger Williams Medical Center and Our Lady of Fatima Hospital. Pursuant to the 2014 sale, Prospect CharterCARE, LLC and it's affiliates acquired the Heritage Hospitals from Roger Williams Hospital and St. Joseph's Health Services of Rhode Island. To complete the sale, the parties sought approval from the office of the Rhode Island Attorney General and the Rhode Island Department of Health as required under the Hospital Conversion Act. During the approval process, the attorney general determined that due to the Heritage Hospitals' outstanding liabilities certain Roger Williams and Saint Joseph's restricted assets would remain with the Heritage Hospitals during their wind-down.

In connection with the 2014 sale and to satisfy the attorney general's conditions, St. Joseph's, Roger Williams, and CharterCARE Health Partners Foundation later named CharterCARE Foundation petitioned this court for cy pres, which would permit the transfer of approximately $8,200,000 in charitable assets to the CharterCARE Foundation. Proposed intervenors allege that while cy pres Petitioners appropriately sought this Court's approval, Petitioners nevertheless failed to apprise the Court that St. Joseph was insolvent and that all of the remaining assets were needed to reduce the

unfunded pension obligations. Notwithstanding this Court granted the cy pres on April 20, 2015, subject to several conditions. The funds were then transferred to CharterCARE Foundation, which are currently under the Rhode Island Foundation's control for investment purposes. Since the cy pres order, proposed Intervenors have brought claims in federal court against CharterCARE Foundation and other Defendants arising out of the cy pres Petitioner's alleged misrepresentations to this Court. CharterCARE Foundation has agreed to preserve certain charitable assets pending resolution of such claims.

Standard of review: Under Rhode Island Superior Court Rule 24(a)2, a petitioner has a right to interview as a matter of law if the following conditions are satisfied:

1. The applicant files a timely appliation.

2. The applicant claims an interest relating to the property or transaction which is the subject matter of the action.

3. The disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, and

4. That the applicant's interest is not adequately represented by the current parties to this action, as

recently reiterated by the Supreme Court in Hines Road, LLC v. Hall, 113 A.3d 924. "A right to intervene under Rule 24(a) does not turn on whether an applicant is likely to succeed in protecting its claimed interest. Moreover, the First Circuit has held a presiding court is required to accept as true non-conclusory allegations made in support of an intervention motion." That is in B. Fernandez v. Kellogg USA, 440 F.3d 541. "Because Rhode Island precedent on intervention is sparse, this Court may refer to federal law for guidance," as our Supreme Court stated in Retirement System of City of Providence v. Corrente, 174 A.3d 1221. The Court will now address each intervention element in turn.

Timelines: To establish a right to intervention, an applicant must prove with appropriate expediency and it is well settled that the determination of timeliness is a matter committed to the sound discretion of the trial justice. Timeliness is analyzed by two criteria:

1. The length of time during which the proposed intervenor has known about this interest in the suit without action, and

2. The harm or prejudice that results to the rights of other parties by delay.

This Court is well aware that post-judgment intervention motions are rarely allowed, and the sheer

passage of time is probative to any intervention analysis. However, the mere lapse of time is not enough to present a right of intervention so long as the intervenor acts promptly after it becomes clear his or her rights have been jeopardized. In other words, the passage of time is measured in relative, not absolute terms. Thus, what may constitute a reasonably prompt action in one situation may be unreasonably dilatory in another.

Here, in framing the timeliness inquiry, it is worth noting that the cy pres order did not constitute a final judgment because no separate document entered pursuant to Superior Court Rule 58 to memorialize the order. Rule 58 provides every judgment shall be set forth on a separate document and as a practical matter this means an order remains interlocutory unless and until the order is imbued with finality of a docket entry independent of the order itself, Furtado v. Laferriere, 839 A.2d 533. For example, in the Furtado case, our Supreme Court explained that a summary judgment order remained interlocutory until the order was entered in a separate document, thereby converting the ruling into a final judgment. As such, the Supreme Court allowed the aggrieved party in Furtado to appeal an adverse summary judgment order nearly nine months after the order entered, as 20 days

had not elapsed since the summary judgment order was separately entered on the document.

Our Supreme Court rejected the argument that Rhode Island courts should apply a reasonableness standard to determine when an order converts to a final judgment. Our Supreme Court reasoned that unlike Superior Court Rule 58's federal counterpart, which provides that judgment is entered for purposes of these rules, when 150 days have run from entry of the civil docket, the Superior Court's rule provides for no such automatic entry. And although our Rule 58 might seem hyper-technical, the mechanical process produces clarity in that all parties are on notice of how much remains for a litigant to appeal an adverse ruling.

It is abundantly clear no separate document entered to memorialize the cy pres order and it, therefore, remained interlocutory from April 20, 2015, to the present. Contrary to CharterCARE Foundation's argument, an order cannot possibly memorialize itself under Rule 58. The soundness of Rule 58 as drafted, which arguably keeps an order open ad infinitum, is a question more appropriately directed to our Supreme Court for the modifications of a rule. Moreover, CharterCARE Foundation could have avoided its present dilemma by moving for an entry of final judgment. Seeking to

subvert its failure to make such a motion, CharterCARE Foundation cites McAuslan v. McAuslan for the proposition that final judgments are those that terminate the litigation on the merits, 83 A. 837, a 1912 case. We agree no magic words are necessary to make a judgment final. However, that does not change the fact the document which terminates the litigation must also, for the purposes of Rule 60, be set out of the underlying dispositive order in compliance with Rule 58. Because this Court was not requested and made no separate entry of final judgment, the cy pres order remained interlocutory and subject to modification by this Court without reference to Rule 60 governing modification of final judgments.

Turning more directly to the timeliness of the present motion, this Court is satisfied that the proposed intervenors have moved with appropriate haste because even though three years have elapsed since the cy pres order entered, the Receiver could not have known of an interest in the litigation until October, 2017, at the earliest. The Receiver was not appointed by this Court until that time and given the complex nature of this litigation, a passage of about eight months, from the time of appointment to the presentation of this motion, is not outside the bounds of reasonableness.

Neither should we assume that plan participants' knowledge of their jeopardized interest in the litigation in April of 2015 regardless of whether they knew this proceeding was ongoing. Our Supreme Court has said that the more appropriate inquiry is whether an intervenor has diligently asserted his or her rights after it became evident that such rights were in jeopardy. Therefore, if we accept as true the proposed intervenors' allegation that cy pres Petitioners mislead this Court about funding levels, which we must at this time, no cause to intervene ripened at the onset of the cy pres. And although there is no Rhode Island precedent stating this proposition, the Court looks towards Brennan v. New York City Board of Education, 269 F.3d 123, a Second Circuit case. It was only after thorough investigation by the Receiver that either the Receiver himself or the plan participants found cause to intervene. Accordingly, the proposed intervenors did not unduly delay in bringing the present motion.

In terms of prejudice, the second timeliness criteria, this Court is not convinced granting the present motion will cause appreciable harm. It is true that the present motion threatens the bedrock of the CharterCARE Foundation, as CharterCARE alleges, but perhaps appropriately so if this Court was in fact misled

into pouring the concrete onto the foundation. Given the pending federal court action and state court action arising out of the cy pres proceeding, this Court finds that CharterCARE Foundation's integrity is already in jeopardy. Furthermore, it's quite possible that reassessing the initial cy pres order will actually solidify the legitimacy of CharterCARE Foundation's charitable endeavors were this Court to deny the proposed intervenors' ultimate request to vacate the April, 2015, order. Therefore, considering both the length of time and prejudice, this Court is satisfied that the timeliness factor is in the favor of the proposed intervenor.

Interest relating to the property: The second inquiry in an intervention analysis is whether an intervenor claims an interest relating to the property or transaction. Our Supreme Court has held that an intervenor's interest in the litigation must be significantly protectable for intervention to be allowed. A protectable interest is one which bears a significantly close relationship to the dispute between the original litigants and the interest must be direct, not contingent.

While a party may seek intervention to protect a variety of interests, many of the cases in which a

sufficient interest has been found under amended Rule 24(a)(2) have been in cases in which there is a readily identifiable interest in land, funds, or some other form of property. And the Court is referring to Credit Union Central Falls v. Groff, 871 A.2d 364.

Here, the proposed intervenors claim an interest in the roughly $8 million in charitable assets that are subject to this proceeding. The proposed intervenors claim the exact funds transferred pursuant to the cy pres order should have remained with the Heritage Hospitals to pay down underfunded pension obligations. Thus, as in Credit Central Falls where a client claimed a right to monies in a limited client trust account, similarly here, multiple entities, including the proposed intervenors and CharterCARE Foundation claim a right to a limited pool of charitable assets. In other words, proposed intervenors are not merely trying to protect their right to collect; rather, they are trying to protect a specific interest in the cy pres funds. Whether proposed intervenors are legally entitled to none, some, or all of the charitable monies involves mixed questions of law and fact more appropriately answered in the subsequent stages of this proceeding. Simply stated, we cannot say that the proposed intervenors' allegation of an interest in this proceeding constitutes a sham or frivolity, thus, we must

accept the allegations as true for the purposes of the motion to intervene. Whether the intervenors ultimately persuade this Court to the cy press order is of no moment at this juncture.

Next, impair or impede an applicant's ability to protect interest: The third intervention prong considers whether the disposition of the action may as a practical matter impair or impede the applicant's ability to protect his or her claimed interest. Whether an intervenor's interest will be impaired largely turns on his or her ability to pursue an alternate remedy in a collateral proceeding. The First Circuit has held in particular that the availability of an adequate remedy softens any plausible claim of prejudice.

Here, CharterCARE Foundation contests that their willingness to hold funds pending resolution of the proposed intervenors' federal claims essentially moots the need for intervention in this proceeding. However, such an argument misses the source of proposed intervenors' potential prejudice. The need to intervene in the present case arises out of the possibility that the federal court will deny jurisdiction over the proposed intervenors' claims pursuant to principals of federalism, particularly the Rooker-Feldman Doctrine, which precludes federal action if the relief requested

would effectively reverse a state court decision or void its holding. It makes sense as a practical matter for this Court to determine whether it was misled during its own proceeding.

This Court cannot be sure whether the federal court will or will not choose to exercise jurisdiction in the federal action. However, there is a possibility the federal court will deny jurisdiction because a finding that the cy pres petitioners defrauded this Court would seriously call into question the legitimacy of this Court's cy pres order. Therefore, because of this possibility, the proposed intervenors potential has been compromised by the cy pres order.

Adequacy of representation: The fourth and final inquiry in deciding a motion to intervene is whether the intervenors are adequately represented by the current parties to the litigation. Rhode Island Superior Court Rule 24(a)(2), our Supreme Court has held hat adequate representation does not exist where a conflict or divergence of interest exists. To show an adequate representation, a party need only produce some tangible basis to support a reported claim of inadequacy.

Here, CharterCARE Foundation has not even contended in its memorandum in opposition that the cy pres petitioners adequately represent proposed intervenors'

interest. Moreover, the very crux of proposed intervenors' federal action is that the cy pres petitioners intentionally shifted funds to CharterCARE Foundation to divest plan participants of their interest in the subject funds. Setting aside the question of whether the cy pres petitioners acted with any ill-will towards plan participants, the simple fact that the petitioners sought permission to allocate the funds to a charitable purpose, whereas plan participants seek the funds to satisfy their vested pension rights, evidences a conflict of interest. In light of the low bar an intervenor needs to hurdle to show inadequate representation, this Court finds proposed intervenors have made the appropriate showing.

Finally, the Court itself has an interest in resolving the veracity of proposed intervenors allegations, as their primary contention is that cy pres petitioners defrauded this Honorable Court. For the foregoing reasons, this Court finds the proposed intervenors have satisfied the elements of 24(a)(2) and, therefore, are entitled to intervene as a right in this proceeding. Accordingly, the Court reserves judgment on argument pertaining to permissive intervention. Importantly, this Court expresses no position respecting the merits of the proposed intervenors' underlying claim,

one way or another, it's not before it at this point. So the motion to intervene as a matter of right is granted. Counsel for the movant shall prepare the appropriate order for the Court. Thank you very much, counsel. This Court is in recess.

MR. WISTOW: Your Honor.

THE COURT: Yes.

MR. WISTOW: If your Honor recalls, we still have the matter of the Court deciding whether or not to approve the proposed settlement, and your Honor was going to give us a scheduling order. It's obvious you've been busy writing that brief.

THE COURT: I want to give counsel an opportunity t respond to what may be some significant papers. Again, now that this is done, let me get it out to you. Just so the parties are aware, it's going to be the very end of this month that the papers are going to be due. I need to allow at least a week to respond. Now that we're done with this, I will get something out.

MR. WISTOW: Thank you, your Honor.

(A D J O U R N E D.)

Exhibit 3

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

In re: CHARTERCARE HEALTH PARTNERS FOUNDATION, ROGER WILLIAMS HOSPITAL and ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND	:	C.A. No: KM-2015-0035

ORDER

Stephen Del Sesto, as Permanent Receiver for the St. Joseph's Health Services of Rhode Island Retirement Plan, Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque ("Proposed Intervenors") having moved to intervene in this action, and CharterCARE Foundation having objected to the motion, and the Proposed Intervenors having replied to CharterCARE Foundation's objection, and the motion having come on for hearing on September 13, 2018, and for the reasons stated in a bench decision rendered on September 17, 2018, the Court hereby orders as follows:

ORDERED:

1. Proposed Intervenors' motion is granted.
2. Proposed Intervenors shall file their proposed pleading forthwith.

ORDERED:

J.
Brian P. Stern
Associate Justice

Stern, J.
Dated: October 2, 2018

ENTERED:

/s/ Carin Miley

Dep. Clerk
Dated: October 2, 2018

Presented by:

/s/ Stephen P. Sheehan
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Stephen P. Sheehan, Esq. (#4030)
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CERTIFICATE OF SERVICE

I hereby certify that, on the 19th day of September, 2018, I filed and served the foregoing document through the electronic filing system on the following users of record:

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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/ Stephen P. Sheehan

Exhibit 4

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	:	

RECEIVER'S PETITION FOR SETTLEMENT APPROVAL

NOW COMES Stephen F. Del Sesto, Esq., solely in his capacity as the Permanent Receiver (the "Receiver") of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), and hereby Petitions this Court to approve the proposed settlement ("Proposed Settlement") of claims the Receiver and certain individual Plan participants (the Receiver and such individuals collectively being the "Plaintiffs") have asserted against CharterCARE Foundation ("CCF") and Rhode Island Community Foundation ("RIF") in a lawsuit filed in the United States District Court for the District of Rhode Island (C.A. No: 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"), which lawsuits concern the alleged underfunded status of the St. Joseph Health Services of Rhode Island Retirement Plan ("the Plan"), as well as claims asserted in another lawsuit pending in Rhode Island Superior Court (C.A. NO.: KM-2015-0035) (the "2015 *Cy Pres* Proceeding") into which the Plaintiffs have been granted intervention.

The Settlement only concerns claims against CharterCARE Foundation and Rhode Island Community Foundation. The Proposed Settlement does not resolve

the Plaintiffs' claims against the non-settling Defendants, or the Plaintiffs' efforts to avoid the sale of Our Lady of Fatima Hospital and Roger Williams Hospital to the current owners and to secure those assets for the Plan. Those claims will continue to be asserted.

Attached hereto as Exhibit A is the settlement agreement ("Settlement Agreement") that the Plaintiffs have entered into subject to obtaining the approval of this Court. The Receiver believes that the Proposed Settlement is in the best interests of the Receivership Estate, the Plan, and the Plan participants, and recommends that this Court approve the Proposed Settlement.

If this Court accepts the Receiver's recommendation, there will be two additional levels of judicial approval required. The next step will be that the Receiver's Special Counsel will file a motion in the Federal Court Action asking that the Proposed Settlement be approved by that court, both because it is required for settlement of class actions 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 applicability of the recently enacted Rhode Island statute specifically addressed to settlements involving the Plan, R.I. Gen. Laws § 23-17.14-35. If that approval is approved, the Settlement Agreement provides that the Settling Parties, with notice to the Rhode Island Attorney General, will petition the Court in the 2015 *Cy Pres* Proceeding, to approve the payment of four million five hundred thousand dollars to the Receiver (for deposit into the Plan after payment of fees and costs), and after such payment to otherwise affirm the continued validity and enforceability of the Court's Order of April 20, 2015 in the 2015 *Cy Pres* Proceeding, and after such payment to vacate the order currently in effect in the 2015

Cy Pres Proceeding restricting the disposition of CCF's funds pending the determination of the Receiver's claims against CCF.

As grounds for this Petition, the Receiver hereby states as follows:

1. The relevant facts and circumstances giving rise to this Receivership Action, the Federal and State Court Actions, and the 2015 *Cy Pres* Proceeding are set forth in the Court's Decision of October 29, 2018[1], concerning the Receiver's settlement (the "Prior Settlement") with CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (collectively the "Heritage Hospitals"), which is incorporated herein by reference.

2. Over the last several weeks, counsel for CCF and Special Counsel in consultation with the Receiver have conducted settlement negotiations. In addition, counsel for CCCB, SJHSRI, and RWH, participated in the instant settlement discussions, inasmuch as the Heritage Hospitals have asserted certain rights concerning CCF and have previously agreed to transfer those rights to Plaintiffs. Moreover the Rhode Island Foundation ("RIF")[2] was consulted concerning the form of releases it would receive from Plaintiffs and the Heritage Hospitals. Thereafter, Plaintiffs, CCF, and the Heritage Hospitals agreed on the terms set forth in the instant Settlement Agreement. The proposed settlement would bind the Receiver, the named Plaintiffs, and the settlement class consisting of "[a]ll participants of the St. Joseph Health Services of Rhode Island Retirement Plan," including:

a) all surviving former employees of St. Joseph Health Services of Rhode Island ("SJHSRI") who are entitled to benefits under the Plan; and

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

[2] The RIF holds CCF's funds for investment purposes.

b) all representatives and beneficiaries of deceased former employees of SJHSRI who are entitled to benefits under the Plan.

Exhibit A (Settlement Agreement) Exhibit 1 (Class Notice) at 1, 11-12.

3. The Settlement Agreement establishes the terms of the Proposed Settlement. In summary, it provides for:

a) payment by CCF to the Receiver of a total settlement payment of four million five hundred thousand dollars ($4,500,000) to be used for the benefit of the Plan, after payment of certain attorneys' fees and costs incurred by the Receiver. This amount consists of three million nine hundred thousand dollars ($3,900,000) to be funded using charitable assets that CCF received in 2015 from SJHSRI and RWH, now held through the Rhode Island Foundation ("RIF"), plus an additional six hundred thousand dollars ($600,000) that will be paid by CCF's liability insurer, RSUI Indemnity Company;

b) transfer to CCF all of "CCCB's Foundation Interests" (as that term is defined in the prior Settlement Agreement that was the subject of the October 29, 2018 Decision: "Settlement A Agreement") that the Receiver may acquire or which he did acquire in the Settlement A Agreement (whether Settlement A is ultimately approved or not); as well as agreement to certain other terms and conditions reflecting CCF's independence as a Rhode Island non-profit independent foundation; and

c) an exchange of certain releases among Plaintiffs, CCF, RIF, and the Heritage Hospitals as provided in the Settlement Agreement, and dismissal of claims that were asserted or could have been asserted in the Federal Action or the 2015 *Cy Pres* Proceeding.

4. Concurrently with the filing of this Petition, the Receiver is posting the Petition on his website, at https://www.pierceatwood.com/receivership-filings-st-joseph-health-services-rhode-island-retirement-plan, for all Plan participants and the general public to view. The Receiver will also send each Plan participant a notice by first class mail informing them of the date of the hearing on the Receiver's Petition for Settlement Approval, and directing them to the Receiver's web site to obtain the Petition.

5. Pursuant to the WSL Retainer Agreement, the attorneys' fees to be paid to Special Counsel in connection with the proposed settlement is 23 1/3% of the gross

settlement amount.[3] Special Counsel in the Federal Court Action intends to ask that court to award fees for Special Counsel's representation of the Settlement Class based upon the fee this Court approved for Special Counsel's representation of the Receiver.

6. The instant settlement meets the standard articulated by the Court in its October 29, 2018 Decision, including application of 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.

See October 29, 2018 Decision at 7 (quoting the "*Jeffrey*" factors").

7. The Receiver believes that the Proposed Settlement advances the interests of the Receivership Estate, the Plan, and the Plan participants, and that the terms of the Proposed Settlement are fair and reasonable given the ordinary risks of litigation and the complexity of the matter, as well as other considerations.

8. In connection with the settlement between the Receiver and CCCB, RWH, and SJHSRI, the Rhode Island Attorney General raised objections regarding CCCB's transfer to the Receiver of CCCB's interests in CCF. The Court in its October 29, 2018 Decision held that the Attorney General's objections regarding the Prior Settlement were premature and not ripe, because the transfer of CCF's interests will not take effect unless that settlement has been approved by the court in the Federal Court Action. Insofar as the Attorney General has any concerns with the Proposed Settlement, those concerns are even more premature and even more unripe because if the Court grants

[3] See Exhibit B (WSL Retainer Agreement at 2).

this Petition, there will be two more levels of judicial approval before CCF's funds will be paid to the Receiver, *viz* the court in the Federal Court Action and this Court in the 2015 *Cy Pres* Proceeding. Indeed, the final level of judicial approval in the 2015 *Cy Pres* Proceeding would be the most appropriate forum to litigate issues raised by the Attorney General pursuant to the Attorney General's role as protector of charitable funds since that proceeding, by definition, is concerned with determining the appropriate disposition of charitable funds.

9. Accordingly, the Receiver recommends that the Court approve the Proposed Settlement as in the best interests of the Receivership Estate, the Plan, and the Plan participants, and authorize and direct the Receiver to proceed therewith.

WHEREFORE the Receiver prays for an Order (i) approving the Proposed Settlement as in the best interests of the Receivership Estate, the Plan, and the Plan participants; (ii) authorizing and directing the Receiver to proceed with the Proposed Settlement; and (iii) granting such further relief as this Court may determine to be reasonable and necessary under the circumstances.

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

/s/ Max Wistow

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Dated: November 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on the 28th day of November, 2018, I filed and served the foregoing document through the electronic filing system on the following users of record:

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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 5

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

ST, JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC. Petitioner	:	
VS.	:	C.A. NO. PC-2017-3856
ST. JOSEPH SERVICES OF RHODE ISLAND RETIREMENT PLAN, AS AMENDED Respondent	:	
BANK OF AMERICA, IN ITS CAPACITY AS TRUSTEE OF RESPONDENT Nominal Respondent	:	

MISCELLANEOUS MOTION

I, Arlene Violet, Esq., am lead counsel (along with Robert Senville, Esq.) to over 285 participants in the retirement plan of St. Joseph Health Services of Rhode Island. My clients are typical of the class of participants in lawsuits filed in this Court and the United States District Court for the District of Rhode Island concerning the alleged underfunded status of the St. Joseph's Services of Rhode Island Retirement Plan. While I have not spoken with each and every person whom I represent I have spoken and met with numerous members of this group during the course of this litigation, have met with the named plaintiffs in the aforesaid respective lawsuits (and numerous others), to discuss with those representative members their thoughts concerning the underfunded status of the Retirement Plan and how it impacts them, and their viewpoint regarding the settlement with CHARTER CARE FOUNDATION and the RI COMMUNITY FOUNDATION and I checked as of December 9, 2018 with the Receiver about any objections to the proposed settlement by my clients which might have been registered with him of which there are none. Accordingly, I can say with great confidence that the plan participants whom I represent wholeheartedly and unequivocally support the Receiver's Petition to proceed with the proposed settlement of claims against the aforesaid defendants with regard to pending litigation.

On behalf of these clients, I move the Court to allow the Receiver to finalize the proposed settlement with the aforesaid entities. The settlement, in my view, is beneficial to my clients'

status as members of the Retirement Plan, particularly given their advanced ages from the mid-70's to age 99, who depend upon their pension checks at present. The proposed settlement is an excellent step in attempting to secure additional funds to bolster the Retirement Plan and benefit my clients who are present participants in the Plan.

Therefore, I along with my co-counsel, wholeheartedly endorse the Receiver's actions concerning the proposed settlement, including the attorney fees requested and respectfully request that this Court support and authorize the Receiver's proposed action.

RESPECTFULLY SUBMITTED,

/s/ Arlene Violet
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CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of December, 2018; I filed and served this document through the electronic filing system on all counsel of record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Arlene Violet

Exhibit 6

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND	)	
VS.	)	C.A. NO. PC-2017-3856
ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN	)	

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

DECEMBER 14, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE.....THE ECEIVER
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL
RUSSELL CONN, ESQUIRE.....FOR CHARTERCARE
JESSICA RIDER, ESQUIR.....ATTORNEY GENERAL
CHRISTOPHER CALLACI, ESQUIRE.....UNITED NURSES

GINA GIANFRANCESCO GOMES
COURT REPORTER

CERTIFICATION

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 17, inclusive, are a true and accurate transcript of my stenographic notes.

GINA GIANFRANCESCO GOMES
COURT REPORTER

FRIDAY, DECEMBER 14, 2018

MORNING SESSION

THE CLERK: Your Honor, the matter before the Court is St. Joseph's Health Services of Rhode Island v. St. Joseph's Health Services of Rhode Island Retirement Plan, Case Number PC-2017-3856. This matter is on for the Receiver's petition for settlement approval, and the Receiver's seventh interim report and sixth request for approval of fees. We also have Case Number KM-2015-0035, In Re: CharterCare Health Partners Foundation. This is on for a joint motion for a stay of all proceedings pending judicial approval of the proposed settlement.

THE COURT: We're going to start with the proposed settlement and depending on the outcome of that, we will address the joint motion to stay and then we'll finish off with the report. Counsel may proceed.

MR. WISTOW: Good morning, your Honor. Before I begin, I want to thank Mr. Del Sesto for his flattering gesture of trying to grow a goatee.

THE COURT: November is over.

MR. WISTOW: Your Honor has undoubtedly read all the submissions. There is certainly nothing I can tell you that you don't know, but there are participants in the plan here who may not be aware of the technicalities. I

would like to just very very briefly outline what the settlement is about.

THE COURT: I'd appreciate it if you would.

MR. WISTOW: This would be the second proposed settlement in the case. There still remains, as these go forward, multiple Defendants, principally Prospect CharterCare, Angell, and the Roman Catholic Bishop of Providence and various entities related to them. This particular settlement that we're asking for approval has already been entered into by the parties thereto, and it's subject to being set aside as a condition subsequent if your Honor chooses to take such an action. The settlement parties are CharterCare Community Board, which was the parent company of the old St. Joseph's Hospital Society of Rhode Island and Roger Williams Hospital, the so-called Heritage hospitals that existed before the 2014 hospital conversion. The other settling parties are CharterCare Foundation and Rhode Island Foundation. Those two groups are settling with the Receiver and the seven individuals who are the punitive class action members.

Your Honor will recall that following the 2014 hospital conversion of the transfer of substantially all the assets of CharterCare Community Board to Prospect CharterCare, we had a situation where we had not for

profits dealing with for profits and there was an issue with what to do with certain charitable funds. There was approximately $8.2 million that had to be dealt with, some of which belonged to Roger Williams Hospital, some of which belonged to St. Joseph's Hospital. There was a petition filed in 2015 in this court, and, indeed, before your Honor, and as a result of that Cy Pres petition $8.2 million was transferred to CharterCare Foundation, one of the settling parties in the motion presently before the Court. The involvement of Rhode Island Foundation is simply really an investment holding wherein Rhode Island Foundation takes the money, decides what appropriate investments are made. The true title to the equitable loan is CharterCare Foundation.

The settlement is as follows, and I have to get into another court involved: If your Honor approves, the plan will receive a gross payment of $4.5 million, which we consider reasonably favorable considering the original sum transferred was $8.2 million. Of that $4.5 million, at least $3.9 would come directly from CharterCare. We negotiated with CharterCare Foundation's records and omissions carrier and they have agreed to put in $600,000 to make up the $4.5.

What is significant, your Honor, is that's an arrangement between CharterCare and its carrier. We have

negotiated, but the underlying obligation to us is from CharterCare Foundation whether the carrier pays or doesn't pay. We had filed a motion to intervene in the 2015 Cy Pres case because it had never been closed, your Honor. Your Honor granted that motion to intervene, and as a result that precipitated the negotiations between counsel for the funds, the retirement fund, and counsel for CharterCare Foundation with the proposed settlement we're talking about now.

If your Honor approves this, it's only one of three necessary steps. If your Honor approves it, we will be going to the Federal Court to ask the Federal Court to approve, indeed, the very same settlement. The most important reason for it being two fold, one, and this does purport to be a class action, so we need to have the Federal Court certify or at least ask the Federal Court to certify this as a class action, and we need the Court to find that it's a fair and equitable settlement within the meaning of the new joint tortfeasor act that has been past in connection with the St. Joseph's Pension Plan. I don't believe there has been any objection filed.

THE COURT: The only papers the Court received was a paper of support from Attorney Violet.

MR. WISTOW: Right. My understanding is your Honor will recall there were three lawyers representing, I

believe, over a thousand planned participants whose involvement in this is simply if ever there comes a time that there is a need or a perceived need for a reduction in the benefits paid out monthly, these various groups may at that point have contentions and those lawyers are representing those groups in that context. There is no conflict insofar as this is involved because all the money is going into one part which would benefit all of these groups. I have spoken to Mr. Callaci. He is in the courtroom I believe today. He is in favor of it and I have spoken to Mr. Kasle, who I believe could not make it today and he informed me he is in favor of it also.

So without objection and relying on, your Honor, what I consider to be a virtually indistinguishable situation in terms of standing and prematurity and ripeness from the situation of the first settlement we made, which in your Honor's October 29, 2018, decision analyzed and approved including the Jeffrey's factors, we would ask that your Honor approve our going forward seeking the further approval of the Federal Court with the understanding that, strangely enough, if we succeed in Federal Court, we will be back before your Honor on the Cy Pres. I don't know if your Honor wants me to address the motion to stay the Cy Pres at this point.

THE COURT: Why don't we deal with this and then we

can deal with the motion to stay which may be a nonissue. There were no papers filed. If they wish to place anything on the record, CharterCare Foundation or Rhode Island Foundation, I will give you the opportunity to do that.

THE COURT: Good morning, counsel.

MR. CONN: Good morning, your Honor. Russell Conn for CharterCare Foundation. I am with Mr. Beale, my local counsel, and Mr. McQueen, the President of CharterCare Foundation is here in the courtroom today. This settlement, indeed CharterCare Foundation supports it. It was negotiated between early October leading right up to the Thanksgiving weekend. You can see from the settlement agreement it's quite detailed. Mr. Wistow and as I principally negotiated the terms and conditions. We think it's an appropriate reasonable settlement that takes into account the varying competing interests towards these funds and we certainly support it. Mr. Wistow mentioned the D&O policy and I can speak to that a little bit. It was a $1 million wasting policy and it was wasting day by day legal fees and we were able to get $600,000 of that to put towards the settlement. It's not before the Court but CharterCare Foundation has its own separate agreement with R.S.E.Y. to fund that $600,000 when and if we get through the final settlement

agreement. So we ask the Court to approve the settlement petition filed by Mr. Wistow and the Receiver.

THE COURT: Thank you very much, counsel. Let me ask Mr. Wallin, do you have anything you want to put on the record?

MR. WALLIN: No, your Honor.

THE COURT: Very good. Attorney Callaci.

MR. CALLACI: Good morning, your Honor. Chris Callaci for the United Nurses and Allied Professionals. I thought it would be the worthwhile that the Court hear from the horse's mouth of Special Counsel, Mr. Wistow's, representation and our support. We have about 400 union members who are participants in this plan and they fully trust and are confident in the Receiver's assessment that the settlement agreement is in the best interest of the receivership estate and the plan, and the plan participants, and we applaud the work that has been done in that regard.

THE COURT: Thank you very much. Counsel.

MS. RIDER: Good morning, your Honor. Jessica Rider on behalf of the Attorney General's Office. Just very briefly, as you know we didn't file any papers. It was addressed in the motion that the Receiver believes the most appropriate forum for our participation is the Cy Pres action and that is when we will file a response.

THE COURT: Let me just ask you while you're up here, the next thing we're dealing with is the joint motion to stay that Cy Pres at this point. As we go through the process, does the Attorney General have any objection?

MS. RYDER: No objection to that motion, your Honor.

THE COURT: Thank you very much. As opposed to the first proposed settlement that was before the Court, this one is in a very different posture where everyone agrees with the proposed settlement which would allow the Receiver and Special Counsel to go to the next step in the process which is to seek appropriate approvals from the Federal Court. The Court has reviewed the papers as well as the filing in support by Attorney Violet, the statement made by Attorney Callaci, and the representation of Attorney Kasle as well.

As the Court detailed in its decision on the last proposed settlement, the Court analyzed what is referred to as the Jeffrey's factors, which is a case issued by the First Circuit Court of Appeals, to determine whether the settlement is appropriate. In the papers itself Special Counsel had gone through those factors, and the Court with respect to the probability of success in the litigation being compromised; the difficulties to be encountered in the matter of collection; complexity of

the litigation involved and the expenses, inconvenience, and delay -- and the Court finds based on the issues raised by CharterCare Foundation, this certainly may have been a long drawn out issue to get to a final conclusion -- and then the interest of the creditors and a proper deference to their reasonable views.

The Court finds that this settlement is, in fact, reasonable and in the interest of the creditors including the pensioners in this case and as a result the Court approves the proposed settlement by the Receiver. And while it's of no consequence as this settlement is pursued, I will look forward in another appropriate case, probably not before this Court, as Attorney Conn finally gets to deal with the issue before the United States Supreme Court on charitable donations and charitable issues and where they belong, but we will not be forced to deal with that issue here. The motion is approved. I would ask Special Counsel to prepare the appropriate order and submit it to the Court. Thank you very much.

Let's move on next to the motion to stay.

MR. WISTOW: As to the claims of the charitable funds that claim is unique in that it's engendered three lawsuits, the federal lawsuit, the state lawsuit that looks like the federal lawsuit except that it doesn't have the ERISA claims, and now the Cy Pres is still

pending. If, indeed, we are able to consummate the settlement, that is to say if the Federal Court approves this particular settlement, and if your Honor approves the settlement in the Cy Pres, then that case will go away. If on the other hand the Federal Court refuses to accept the settlement that we're proposing for whatever reason, perhaps your Honor will not accept the end result, then in that case we need to go forward with the Cy Pres. But in the interim considering, we hope, the likelihood that the settlement will go through, it seems a needless waste of court time and lawyer time for us to be proceeding on a Cy Pres, which, hopefully, just disappears as a result of the settlement. We are asking that everything be stayed in that proceeding then the existing order, when I say freezing the assets, it's understood it's not totally frozen, will continue in place and I believe there is no objection.

THE COURT: I know the Attorney General said there is no objection.

MR. CONN: There is no objection. This is a joint motion. I think Mr. Wistow is referring to the Court's June 28th, 29th preservation order and we agree that stays in full force and effect during the stay.

THE COURT: Very good. Logically and preservation of the state expenses the motion makes perfect sense to

the Court. The motion to stay is approved with the carve out if it is implicated that preservation order will stay in full force and effect. Thank you very much.

That kind of brings us to the wrap up of today which is the Receiver's interim report. Counsel, you may proceed.

MR. DEL SESTO: Thank you, your Honor. Your Honor, unless you wish me to go through the details of the report, I'm going to focus just merely on the highlights.

THE COURT: That's fine.

MR. DELSESTO: One of the issues I was going to discuss and that is discussed in the report is what was just presented by Special Counsel, so I'm not going to go through that again either. With regard to that going forward, your Honor, the main thing I want to address is the prior settlement that this Court had approved back in mid November. That settlement has been presented to the Federal Court. The time period for objections for approval of that settlement by the Federal Court is either the 24th of December or the 26th or 27th. I don't remember the exact date but it is this month and it's coming up within at least ten days, that's where that stands right now, your Honor. The litigation in Federal Court, motions to dismiss have been filed, responses are being prepared, and that is moving along in accordance

with Judge Smith's scheduling order on that.

Other than that, your Honor, I have had constant communications with the expert that I retained in this case regarding the ERISA issues for this plan. I continue those communications. Other than to report to the Court that those communications continue with expert counsel, that's all I really have to report at this time. There has been no determination made at this time as to how to deal with that issue and that will be done in conjunction with special counsel as well as expert counsel to consider all the factors which include the litigation as going forward in Federal Court.

Beyond that, your Honor, I did want to mention just the status of the plan. When I was appointed back on August 17th of 2017, the plan had approximately $86 million in assets. The Court might recall that it was reported at that time that the monthly benefit payment obligation was approximately $850,000 per month at that time. Also, the Court at the beginning of the case froze the processing of applications and elections. So we were proceeding for approximately seven months, August through March on that $850,000 a month payment obligation to the beneficiaries.

In March of 2018, at my request and recommendation, the Court approved the lifting of that freeze of

applications and elections and we began to process those applications and elections. That process resulted in two financial impacts to the plan. One, they were retroactive payments that were required to be made in conjunction with those applications and elections, and in addition on a go-forward basis the monthly payment obligation on those benefits increased by approximately $125,000 per month as a result of all of those things, your Honor, or in addition to all of those things, your Honor. The market is much different today than it was in the prior years, two or three years, for this plan where it was experiencing some consistent steady growth. For a long period of time we had a better period of volatility. The first major period of volatility happened in February of 2018. So although the plan is still performing and generating investment income, it is not producing investment income at the same rate that it was previously.

Another factor in that, as your Honor might recall, I sat down with the investment manager in February and March and discussed a change in the allocation of the assets. We did elect to change that allocation, which was a 60/40 split to a 50/50 split.

THE COURT: 60 equities before --

MR. DELSESTO: That's correct, your Honor. That

reduction or that reallocation rather of the investments has insulated the plan somewhat in the volatility, but at the same time that allocation, obviously, means that it's a less aggressive investment opportunity for the plan. So all of those things combined, the increase in the monthly benefit payments, the retroactive payment that had to be made, and the reduction in the benefit of the investments has resulted in today, 16 months later, the plan's assets are approximately $76 million, about $10 million difference. Obviously, when you look at the math, we still have benefitted from the investment because based on those numbers on payment of benefits alone we would normally be down somewhere in $70 million, maybe slightly lower than $70 million, but the investments have kept those buoyed slightly to keep it at the $76 million.

I mention all of this for two reasons, your Honor, one, to give the Court a general report of where we are in terms of the assets that the plan holds and to provide that financial picture, but also to stress -- and I know your Honor understands this and we've already been before your Honor now twice on the settlement approvals -- but the need to get these settlements approved by not only this Court but by the Federal Court so that those funds can be utilized by the plan to assist and keep a runway

for this plan going as we continue through the litigation.

So with regard to my report, aside from the details that are in the report and the settlement of the CharterCare Foundation that special counsel had discussed prior to my report, unless your Honor has any questions, I will move over to the fee portion.

THE COURT: That's fine.

MR. DEL SESTO: Your Honor, with regard to the fees, costs, and expenses of the Receiver, the time period for these fees goes for the prior 60 days ending on October 31st. Fees of the Receiver are $73,249.50 with expenses of $1,384.96, for a total of $74,634.46. In addition to that, your Honor, Mercer, who is the investment advisor for the plan, there were two invoices that they had outstanding just prior to my appointment and they remain outstanding at this time. One of the invoices is a fully -- I would call it a pre-receivership invoice. The other covers a portion of the receivership and a portion prior to the receivership.

Normally, your Honor, these types of invoices are not paid and there is not a recommendation to pay these. However, with the fact that Mercer continues to act as the investment advisor they have asked about these. I believe the Court has in the past approved payment of

prepetition amounts because of the continued involvement and the importance of that continued involvement of that particular vendor. I believe this case warrants that same type of consideration, and in addition to my fees and costs and expenses, your Honor, I would ask that the fees of Mercer for the invoices covering the period of April 1, 2017, through June 30, 2017, and July 1, 2017, through August 17th of 2017 be approved. The amount of that, your Honor, is approximately $41,000 and I ask that those be approved and that will bring Mercer current and they are being paid current by me in conjunction with the work they have been providing.

THE COURT: Thank you. The Court has received no objection to the report. First, on the settlement proposal, I just don't want to miss this, I forgot to put on the record. It was also in there Special Counsel's fee is based on a contingency fee plus costs. With respect to the settlement, the Court finds that the contingency fee being charged is, in fact, fair, reasonable, and very much a benefit to the receivership estate. I want to make sure on that case it's on the record as well.

With respect to this, the Court has had the opportunity to read the extensive report, the Court does approve the report ratifying the acts and deeds. I do

understand the issues in terms of Mercer and the continuity and those fees are approved and for the benefit of the estate. The Court also approves the Receiver's fees and expenses as fair and reasonable and for the benefit of the estate. I wold ask that you please prepare the appropriate order for the Court's signature. And with respect to the settlement, I understand that triggers certain things on the federal side, so I just ask that if we could get that in as quickly as possible just because the Court goes to a duty schedule at some point next week. So I just want to make sure that is executed so there is no issue there.

MR. DEL SESTO: Thank you. May I approach, your Honor?

THE COURT: Yes.

(Document handed to the Court.)

THE COURT: Are there any other matters at this point? Okay. I want to thank everyone very much. The Court will be in recess.

(A D J O U R N E D.)

Exhibit 7

STATE OF RHODE ISLAND PROVIDENCE, SC		SUPERIOR COURT
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
v.	:	C.A. No.: PC-2017-3856
ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, AS AMENDED	:	

ORDER

The Receiver of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") having filed a Petition for Settlement Approval relating to a Proposed Settlement Agreement ("PSA") among the Receiver, seven individuals, CharterCARE Foundation, CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island, and Roger Williams Hospital, and the pension participants and beneficiaries represented by Attorney Arlene Violet having filed a Miscellaneous Motion in support of the petition, and the Court having conducted a hearing on December 14, 2018, and no objection having been filed or made, and for the reasons stated at the hearing, it is hereby:

ORDERED, ADJUDGED, AND DECREED:

1. That the Petition for Settlement Approval is granted;

2. That the PSA is in the best interests of the Receivership estate and the Plan's participants and beneficiaries;

3. That Special Counsel's contingent fee of 23 1/3% as set forth in the Petition for Settlement Approval is fair, reasonable, and a benefit to the Receivership estate; and

4. That the PSA may be filed with the Federal Court at an appropriate time for further proceedings.

ORDERED:

/s/ Brian P. Stern
Stern, J. Associate Justice
Dated: December 27, 2018

ENTERED:

/s/ Stephen Burke
Dep. Clerk General Chief Clerk
Dated: December 27, 2018

Presented by:

/s/ Max Wistow, Esq.
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Stephen P. Sheehan, Esq. (#4030)
Benjamin Ledsham, Esq. (#7956)
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Dated: December 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of December, 2018, I filed and served the foregoing document through the electronic filing system on the following users of record:

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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 8

HEARING: JANUARY 18, 2019; 9:30 A.M.

STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	)	
vs.	)	C.A. No.: PC-2017-3856
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended.	)	

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

NOW COME Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and Prospect Chartercare, LLC (collectively, "Prospect Entities"), by and through their attorneys, and hereby provide the Court with notice of their intent to sue Chartercare Community Board, or in the alternative, seek relief from the injunctive provisions of the permanent receivership Order entered on October 27, 2017. In support hereof, the Prospect Entities submit a memorandum of law filed contemporaneously herewith.

[Signature page to follow]

PROSPECT MEDICAL HOLDINGS, INC., AND
PROSPECT EAST HOLDINGS, INC.

/s/ *Preston W. Halperin*
/s/ *Dean J. Wagner*
/s/ *Christopher J. Fragomeni*
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PROSPECT CHARTERCARE, LLC,

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2018, the within document was electronically filed through the Rhode Island Superior Court Case Management System by means of the EFS and is available for downloading by all counsel of record.

/s/ *Christopher J. Fragomeni, Esq.*

HEARING: JANUARY 18, 2019; 9:30 A.M.

STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	)	
vs.	)	C.A. No.: PC-2017-3856
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended.	)	

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

The Prospect Entities[1] bring this motion for two purposes:

1. To provide this Court with notice of their intention to sue Chartercare Community Board f/k/a Chartercare Health Partners ("CCCB")[2] for (i) CCCB's violation of the provisions of the Amended and Restated Limited Liability Company Agreement of Prospect Chartercare, LLC (the "LLC Agreement"), and (ii) contractual indemnity pursuant to the Asset Purchase Agreement ("APA"). While, as addressed below, such Lawsuits should not require leave from this Court before being filed, to the extent necessary, the Prospect Entities seek leave through this motion to file them; and

[1] Prospect Medical Holdings, Inc. ("Prospect Medical"), Prospect East Holdings, Inc. ("Prospect East") and Prospect Chartercare, LLC ("Prospect Chartercare").

[2] Prior to the 2014 Sale, CCHP was an entity with two hospital subsidiaries: Our Lady of Fatima Hospital ("Fatima Hospital") and Roger Williams Hospital ("RWH;" collectively, "the Hospitals"). After the 2014 Sale, CCHP changed its name to CCCB. The terms CCHP and CCCB will be used herein relative to the appropriate point in time (i.e. whether before or after the 2014 Sale).

2. The obtain relief from this Court from the injunctive provisions of the Permanent Receivership Order ("Order") to allow Prospect Chartercare to file—or instruct the Receiver to file—administrative petitions ("Administrative Petitions") with the Rhode Island Attorney General ("RIAG") and Rhode Island Department of Health ("RIDOH") regarding the contemplated change in ownership of Prospect Chartercare as a result of the Receiver's assumption of an interest in CCCB pursuant to the Settlement Agreement between CCCB, the Receiver, and others.

BACKGROUND FACTS AND PROCEEDINGS

Prior to 2014, St. Joseph Health Services, Inc. ("SJHSRI") owned and operated Fatima Hospital and, as a benefit to its employees, sponsored the St. Josephs Health Services of Rhode Island Retirement Plan ("the Retirement Plan"). However, over many years, SJHSRI sustained significant financial losses and, as a result, entered into an affiliation agreement ("Affiliation Agreement") to share operational expenses with RWH. As part of the Affiliation Agreement, RWH and SJHSRI organized into subsidiaries of CCHP.

Despite the Affiliation Agreement, CCHP continued to incur significant financial losses and ultimately solicited offers for outside capital from entities that invested in or operated hospitals. Prospect East responded to such solicitation, and in 2014, certain of CCHP's assets were sold ("2014 Sale") for (1) a cash payment of $45 million, (2) a commitment to capital project and network development, and (3) a grant to CCCB of a fifteen percent (15%) ownership interest in a newly-formed limited liability company, Prospect Chartercare, which in turn owned Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI") and Prospect Chartercare RWMC,

LLC ("Prospect RWMC").[3] The 2014 Sale was expressly conditioned upon any liability for the Retirement Plan remaining with SJHSRI. The RIAG and RIDOH reviewed, evaluated, and approved the 2014 Sale pursuant to the Hospital Conversion Act ("HCA") and the Health Care Facility Licensing Act of Rhode Island ("HLA").

The Asset Purchase Agreement Excludes the Retirement Plan and Provides for Indemnification

In connection with the 2014 Sale, SJHSRI, RWH, CCHP, and the Prospect Entities, among others, executed the APA.[4] The APA listed assets that were specifically excluded from the 2014 Sale. Among the "excluded assets" were "any Seller Plans (any and all assets associated therewith or set aside to fund liabilities related thereto), the Retirement Plan[5] and the Retirement Plan Assets[6]." *See* APA at § 2.2(d). The APA also provided that CCHP, RWH, and SJHSRI would indemnify Prospect Medical, Prospect East, and Prospect Chartercare from any liability relating to the Retirement Plan. Specifically, the APA states the following:

> Sellers[7], jointly and severally, shall indemnify, defend and hold harmless Prospect, the Prospect Member, the Company, the Company Subsidiaries and their respective Affiliates, officers, directors, trustees, employees, stockholders, partners, members, agents, representatives, successors and permitted assigns (collectively, the "Company/Prospect Indemnified Persons"), from and against any loss, Liability, claim, damage or expense (including costs of investigation and defense and reasonable attorneys' fees and expenses), whether or not involving a Third-

[3] CCCB's fifteen percent interest in Prospect Chartercare was subject to the LLC Agreement. Prospect SJHSRI and Prospect RWMC were entities that owned the Hospitals post-2014 Sale.

[4] The 2014 APA is a public document posted on the RIAG's website at http://www.riag.ri.gov/CivilDivision/OfficeoftheHealthCareAdvocate.php under "Recent HCA Reviews," "CharterCARE/Prospect" and "Public Exhibits" and included thereunder as Exhibit 18.

[5] The APA defines "Retirement Plan" as "the St. Joseph Health Services of Rhode Island Retirement Plan." APA at A-13.

[6] The APA defines "Retirement Plan Assets" as "the assets, cash and investments of the Retirement Plan." APA at A-13.

[7] The APA defines "Sellers" to include CCHP, RWH, and SJHSRI, among others.

> Party Claim (collectively, "Damages"), arising from or in connection with:
>
> [. . .]
>
> (c) the Excluded Assets and Excluded Liabilities; and
>
> (d) Sellers' operation of the Business[8] prior to the Closing Date to the extent not contained in the calculation of Final Net Working Capital, including . . . (ii) Liabilities for funding of, or tax or ERISA penalties or any other liabilities with respect to, the Retirement Plan . . . .

APA at § 14.2(d).

The LLC Agreement Prohibits Transfers of a Member's Interest

Prospect Chartercare was created as part of the 2014 Sale. Pursuant to the LLC Agreement, Prospect Chartercare has two members: Prospect East and CCCB. The LLC Agreement specifically prohibits a member's ability to transfer its interest in Prospect Chartercare as follows:

> 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 [Prospect Chartercare] (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 at § 13.1. The LLC Agreement further states that

> [n]o Transfer of an interest in the Company that is in violation of this Article XIII shall be valid or effective, and the Company shall not recognize any improper transfer for the purposes of making allocations, payments of profits, return of capital contributions or other distributions with respect to such Company interest or part thereof.

Id. at § 13.6.

[8] "Business" means "the business, operation or ownership of the Facilities and the Purchased Assets." *See* APA at A-2. The "Facilities" means the "Hospitals," which is defined as RWH and Fatima Hospital. *See id.* at A-5, A-7.

The Retirement Plan is Placed Into Receivership

After the 2014 Sale, SJHSRI filed a petition with this Court, requesting that the Court place the Retirement Plan into receivership due to the Retirement Plan's insolvent state ("Receivership Action"). *See St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan*, PC-2017-3856 (R.I. Super. Ct. Aug. 18, 2017). The Court appointed a temporary receiver, and ultimately appointed Stephen Del Sesto as permanent receiver ("Receiver"). The order appointing the Receiver ("Order") provides, in pertinent part, the following:

> That the commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, or any other proceeding, in law, or in equity or under any statute, or otherwise, *against the Respondent or any of its assets or property*, in any Court, agency, tribunal, or elsewhere, or before any arbitrator, or otherwise by any creditor, corporation, partnership or any other entity or person, or the levy of any attachment, execution or other process upon or against any asset or property of the Respondent, or the taking or attempting to take into possession any asset or property in the possession *of the Respondent* or of *which the Respondent has the right to possession*, or the cancellation at any time during the Receivership proceeding herein of any insurance policy, lease or other contract with the Respondent, by any of such parties as aforesaid, other than the Receiver designated as aforesaid, without obtaining prior approval thereof from this Honorable Court, in which connection said Receiver shall be entitled to prior notice and an opportunity to be heard, are hereby restrained and enjoined until further Order of this Court.

(Emphasis added).

The Receiver Files the Federal Court Action Seeking To Hold the Prospect Entities Liable For the Underfunding of the Retirement Plan

In June 2018, the Special Counsel that was engaged by the Receiver filed suit on behalf of the Retirement Plan and several of its participants (collectively, "Federal Action Plaintiffs")

against numerous entities, including the Prospect Entities and CCCB, in the United States District Court for the District of Rhode Island ("Federal Action"). *See Stephen Del Sesto v. Prospect Chartercare, LLC, et al*, 1:18-cv-00328-WES-LDA (D.R.I. Jun 18, 2018). Among other things, the Federal Action Plaintiffs allege that the Prospect Entities are liable for a purported underfunding of the Retirement Plan. *See e.g., id.*, ECF No. 60 at ¶ 461.

The Receiver And CCCB Enter Into A Settlement Agreement That Violates The LLC Agreement

In September 2018, the Receiver entered into a settlement agreement with CCCB and then filed a Petition for Settlement Instructions ("Settlement Petition") in the Receivership Action, requesting that the Court "approv[e] the Proposed Settlement as in the best interest of the Receivership Estate, the [Retirement] Plan, and the Plan participants," and "authoriz[e] and direct[] the Receiver to proceed with the Proposed Settlement." Attached to the Settlement Petition was the executed settlement agreement ("Settlement Agreement"), which was between the Receiver, the Federal Action Plaintiffs, CCCB, SJHSRI, and RWH.

The Settlement Agreement provides that CCCB will hold its interest in Prospect Chartercare "in trust for the Receiver," and the Receiver "will have the full beneficial interest therein." *See* Settlement Agreement at ¶ 17. It further provides that at the direction of the Receiver, CCCB will exercise the Put Option[9] in the LLC Agreement and remit to the Receiver the proceeds of the Put Option. *See id.* ¶ 18. Additionally, pursuant to the Settlement Agreement, (1) the Receiver has the right to sue in the name of CCCB to collect or otherwise obtain the value of the beneficial interest in Prospect Chartercare; (2) CCCB, upon the

[9] The Put Option provides that upon certain conditions, CCCB "shall have the option to sell to [Prospect East], and [Prospect East] shall have the obligation to purchase, all of the Units held by CC[CB] in exchange for a payment in case of a purchase price equal to the Appraised Value of the Units . . ." *See* LLC Agreement at § 14.5(a).

Receiver's written demand, must file a petition for its judicial liquidation and follow the request of the Receiver to marshal its assets and oppose claims of creditors; and (3) CCCB will grant a security interest in essentially all its assets, which includes its membership interest in Prospect Chartercare. *See id.* at ¶¶ 19, 24, 29. On September 4, 2018, the Receiver filed a UCC-1, asserting a purported interest in essentially all of CCCB's assets.

Prospect East Notifies CCCB of the Violation in Anticipation of Bringing Suit

Because the Settlement Agreement provides for the hypothecation of CCCB's interest in Prospect Chartercare in direct contravention of the provisions of the LLC Agreement, Prospect East sent CCCB a Notice of Dispute letter pursuant to the detailed dispute resolution procedures in the LLC Agreement. The Notice of Dispute letter informed CCCB that the transfer of CCCB's interest in Prospect Chartercare as provided in the Settlement Agreement constituted an ineffective, invalid, and prohibited transfer under the LLC Agreement.

Prospect Chartercare Files the Administrative Petitions With the Relevant State Regulators

Prospect Chartercare also filed a Petition for Declaratory Order ("Petition") with the RIAG and RIDOH pursuant to R.I. Gen. Laws § 42-35-8. The Petition sought the following declarations: (1) that the proposed transfer of CCCB's interest in Prospect Chartercare pursuant to the Settlement Agreement violated the HCA, HLA, and is inconsistent with the Final Conversion Decisions and Change in Effective Control Decision (collectively, "Decisions") issued by the RIAG and RIDOH, respectively; (2) that the proposed transfer of CCCB's interest in Prospect Chartercare pursuant to the Settlement Agreement is a conversion under R.I. Gen. Laws § 23-17.14-4(6) of the HCA and is thus not permitted absent approval by the RIAG and RIDOH; (3) that any application filed by the Receiver for review and approval of the Settlement Agreement is barred by the doctrine of administrative finality; and (4) that the Decisions bar any

claim that Prospect Chartercare is liable for the Plan. In connection with the Petition, the Receiver filed a motion for contempt ("Contempt Motion"), requesting that the Court find Prospect Chartercare in contempt of court for violating the Order by initiating an action against the receivership estate.

The Court Rules on the Receiver's Settlement Petition and Contempt Motion, Leading to This Motion

After the Court held a hearing on the Settlement Petition, it issued a written decision ("Settlement Decision"), holding, among other things, that the Prospect Entities did not have standing to object to the Settlement Petition; and that the Settlement Agreement was in the best interest of the receivership estate. *See St. Joseph Health Servs. of R.I. v. St. Josephs Health Servs. of R.I. Ret. Plan*, 2018 R.I. Super. LEXIS 94, *25-26 (R.I. Super. Ct. Oct. 29, 2018). Subsequently, the Court issued a written decision on the Contempt Motion ("Contempt Decision"). *St. Joseph Health Servs. of R.I. v. St. Josephs Health Servs. of R.I. Ret. Plan*, 2018 R.I. Super. LEXIS 100, at *17 (R.I. Super. Ct. Nov. 14, 2018). In the Contempt Decision, the Court reserved its decision on contempt, and provided Prospect Chartercare ten days to withdraw the Petition, indicating that Prospect Chartercare should thereafter seek leave of Court to re-file the Petition after notice and hearing. *Id.* Prospect Chartercare thereafter withdrew the Petition, and this motion now follows.

ARGUMENT

The Prospect Entities raise two separate matters by way of this motion. First, they provide notice to the Court that they intend to sue CCCB in Delaware for (1) its breach of the LLC Agreement by transferring its interest in Prospect Chartercare to the Receiver; and (2) contractual indemnification arising out of the APA, inasmuch as the Receiver has alleged that the Prospect Entities are liable for the Retirement Plan's liabilities. Both of these claims

(collectively, the "Lawsuits") are founded in contracts between the Prospect Entities and CCCB and should not be deemed subject to the Order. However, to the extent that the Court finds that such lawsuits fall within the scope of the Order, the Prospect Entities seek relief from the Order to bring such lawsuits pursuant to the terms of the underlying contracts. Relief is warranted so that the Prospect Entities may take necessary action to protect their legitimate, contractual interests, and preserve and assert claims that they have against business associates.

As to the Administrative Petitions, the Court should grant Prospect Chartercare relief from the Order to file the Administrative Petitions so that the appropriate regulatory agencies—the RIAG and RIDOH—can determine whether the provisions of the Settlement Agreement—in particular, the transfer of interest from CCCB to the Receiver—comply with the HCA, HLA, and conditions of the Decisions. Prospect Chartercare respectfully requests leave to refile the Administrative Petitions or, in the alternative, asks that the Court direct the Receiver to seek the necessary regulatory input or approval regarding CCCB's transfer of its interest in Prospect Chartercare to the Receiver.

A. The Order Does Not Prevent the Prospect Entities from Suing CCCB, and the Court's Equitable Jurisdiction Does not Extend to Claims of Creditors of CCCB.

The Prospect Entities respectfully provide notice to the Court of their intent to initiate the Lawsuits against CCCB. Relief from the Order is not necessary prior to the Prospect Entities filing the Lawsuits because the Order does not prevent the Prospect Entities from suing CCCB, and the Receiver has no standing to request that the Court equitably enjoin the Prospect Entities from suing CCCB. However, to the extent the Court disagrees, the Prospect Entities respectfully request leave to bring such actions, for the reasons addressed below.

1. The Order does not enjoin suits against CCCB.

For purposes of the proposed Lawsuits, CCCB's affiliation with the Receiver solely arises out of it holding its interest in Prospect Chartercare in trust for the Receiver. However, simply because CCCB holds an interest in trust for the Receiver does not make CCCB part of the receivership estate and preclude claims by third parties against CCCB.

This Court has held that actions against parties who contract with an entity in receivership do not violate a receivership order enjoining actions against the receivership estate. *See Dulgarian v. Sherman*, 1991 R.I. Super. LEXIS 1, at 4-5 (R.I. Super. Ct. Jan 7, 1991). For instance, in *Dulgarian*, a seller sold a parcel of property ("Property") to a buyer for $459,315, which the buyer financed through (1) a note and mortgage to Atrium Financial Service Corporation ("AFSC"); and (2) a note and mortgage to the seller, which mortgage was junior to AFSC's mortgage. *Id.* at 1. Subsequently, the buyer defaulted on the terms of the note that it gave to the seller, and the seller foreclosed on the property. *Id.* at 1-2. At the time of the foreclosure, AFSC was in receivership, and an order prohibited the commencement or prosecution of any action, suit, or foreclosure against AFSC or its property. *Id.* at 2. The seller filed a lawsuit against the buyer, and sought summary judgment as to the buyer's liability on the note that it gave to the seller. *Id.* In objecting to the seller's motion for summary judgment, the buyer argued that the seller's foreclosure of the Property violated the order enjoining any action against AFSC or its assets. *Id.* at 3. The Court rejected that argument, holding that, while the order staying action against AFSC or its assets "would certainly operate to preclude foreclosure actions by [AFSC's] creditors against property owned by [AFSC], it would not preclude a foreclosure action by [seller] against the property owned by [buyer]." *Id.* at 4. The court noted that "[t]he stay does not affect the creditors of [buyer] merely because [AFSC] holds a first mortgage on the property." *Id.* The Court held that the buyer's argument that the foreclosure

was invalid because AFSC was in receivership at the time "must fail" because "[t]he stay in the [AFSC] case operated to preclude creditor action against its property interests." *Id.* at 5. Additionally, the Court held that "[t]he foreclosure by [seller], a junior mortgagee of the property . . . had absolutely no effect on [AFSC's] rights or interest in the property" because after a junior mortgage holder forecloses, "the senior mortgage remains on the property and the purchaser takes the property subject to this mortgage." *Id.* at 5. As such, the Court concluded that "[s]ince the [] stay did not operate to preclude [seller's] right of foreclosure against [buyer], and foreclosure of the junior mortgage in no way affected [AFSC's] superior property interest, [buyer's] argument that the foreclosure sale is void must fail. *Id.*

Here, it is wholly undisputed that prior to execution of the Settlement Agreement, disputes between Prospect East and CCCB relating to Prospect Chartercare, the LLC Agreement, or APA would not be part of the receivership estate and would not be subject to the injunctive provisions of the Order. The Settlement Agreement does not change that conclusion. The Settlement Agreement provides that CCCB's interest in Prospect Chartercare is to be held by CCCB "in trust for the Receiver, and that the Receiver will have the beneficial interests therein." Settlement Agreement at ¶ 17. However, CCCB continues to hold the membership interest and thus, continues to carry the contractual and fiduciary obligations and responsibilities thereunder. Moreover, CCCB remains obligated under the APA to indemnify the Prospect Entities. The mere fact that the Receiver claims a beneficial interest in CCCB does not alter the contract rights and obligations of CCCB under the LLC Agreement or APA; CCCB is a legal entity distinct from the Receiver and is governed (1) by the LLC Agreement and the fiduciary obligations arising thereunder; and (2) the APA, which requires CCCB to indemnify the Prospect Entities.

Just as in *Dulgarian*, even though the Receiver has an arguable contingent interest in CCCB, the Prospect Entities suit against CCCB has no effect on the interest that the Receiver holds in CCCB and therefore does not violate the Order. The legal title to the membership in Prospect Chartercare remains with CCCB, and CCCB is thus subject to the terms of the LLC Agreement and the fiduciary obligations arising thereunder. Similarly, CCCB is still an independent entity and subject to the terms of the APA. Accordingly, a dispute between the Prospect Entities and CCCB with regard to the LLC Agreement and the fiduciary obligations arising thereunder, or under the APA, does not change the position of the Receiver. In other words, no matter the outcome of the Prospect Entities claims against CCCB, the Receiver's interest in CCCB will remain. The Receiver's claimed contingent, beneficial interest in CCCB cannot prevent the resolution of disputes between CCCB and third-parties (the Prospect Entities) who are outside of the receivership estate.

Indeed, any other conclusion would be exceedingly strange. The LLC Agreement and the APA place a series of obligations, restrictions and responsibilities on CCCB as a member of Prospect Chartercare. The fact that CCCB has entered into an agreement with the Receiver cannot be seen to void any of those obligations, restrictions or responsibilities. How can it be the case that the Settlement Agreement vitiates a series of contractual responsibilities and limitations? If CCCB begins simply flouting its contractual obligations, is there truly no legal remedy? The Receiver seems to contend exactly that. But, frankly, that is an unsupportable position. It would be an extraordinary exercise of power to hold that the Prospect Entities cannot seek to vindicate their contractual rights based on the actions of others.

Accordingly, the Order does not, and should not, preclude the Prospect Entities from seeking to effectuate their contractual rights pursuant to the LLC Agreement and APA.

Therefore, the Prospect Entities respectfully provide notice to this Court of its intention to initiate a lawsuit against CCCB (1) relative to its breaches of the LLC Agreement; and (2) for indemnification under the APA.

2. Enjoining the Prospect Entities would constitute an extension of the Court's equitable jurisdiction beyond its limits.

In the Settlement Decision, this Court ruled that the Prospect Entities lacked standing to challenge provisions of the Settlement Agreement that they found objectionable. However, in rejecting the Prospect Entities' arguments that the Settlement Agreement included provisions that violate the LLC Agreement, the Court acknowledged that the receivership proceeding was "not the appropriate proceeding to unwind the litany of objections the Prospect Entities lodge." *St. Joseph Health Servs. of R.I.*, 2018 R.I. Super. LEXIS 94, at *26. The Court further stated that the "dispute between CCCB and the Prospect Entities belongs in a different proceeding—one where a court can dedicate appropriate judicial resources to resolving that isolated dispute." *Id.* Finding that the Prospect Entities could not contest the objectionable terms of the Settlement Agreement in the receivership proceeding, the Court recognized that the Prospect Entities nevertheless had the right to challenge objectionable terms in another proceeding. *See id.* ("Because the Prospect Entities have no right to contest the terms they find objectionable in this proceeding, they do not waive the right to do so in another"). That other proceeding is exactly what the Prospect Entities seek to initiate following this motion.

And just as the Court ruled that the Prospect Entities have no standing to challenge a contract between the Receiver and CCCB, similarly, the Receiver would have no standing in an action for CCCB's breach of contracts that it had with third parties. The LLC Agreement and the APA are contracts among CCCB and the Prospect Entities, not the Retirement Plan or the Receiver. Just as the Prospect Entities were found to be strangers to the Settlement Agreement,

it is equally true that the Receiver is a stranger to the LLC Agreement and APA. The Receiver's claimed interest in CCCB is insufficient to confer standing on him to either participate in that litigation or to seek to enjoin it.

A party "generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties." *Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 417 B.R. 197, 210 (Bankr. S.D.N.Y. 2009) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). In the Settlement Decision, this Court elaborated on that principal:

> . . . our Supreme Court has consistently held that "strangers to a contract lack standing to either assert rights under that contract or challenge its validity." *See, e.g., DePetrillo v. Belo Holdings, Inc.*, 45 A.3d 485, 492 (R.I. 2012) (prospective purchaser lacked standing to challenge purchaser's exercise of right of first refusal where prospective purchaser was a stranger to a contract between the vendor and purchaser providing for first refusal rights); *Sousa v. Town of Coventry*, 774 A.2d 812, 815 n.4 (R.I. 2001) (rejecting argument that "an individual who is not a party to a contract may assert the rights of one of the contracting parties in order to void a contract or have it declared unenforceable").

Accordingly, the Prospect Entities have the right to litigate their contract dispute with CCCB "in a different proceeding" and the Receiver has neither standing to assert rights under the LLC Agreement nor the right to impair the Prospect Entities' rights under the LLC Agreement by petitioning this Court for equitable relief.

Since the Receiver and CCCB are legally distinct, and the Receiver has no direct interest in the contract dispute between the Prospect Entities and CCCB relating to a breach of the LLC Agreement, this Court should not grant equitable relief to the Receiver by enjoining the Prospect Entities from pursuing their contract claims against CCCB. Equitable jurisdiction of the Superior Court "is not limitless" and is predicated on a litigant being entitled to some form of equitable relief. *See Ret. Bd. of the Emplees. Ret. Sys. of Providence v. Corrente*, 111 A.3d 301,

306 (2015) ("[A] litigant must seek or be entitled to some form of recognized equitable relief in order to invoke this jurisdiction"). At best, the Receiver has beneficial interest in the assets of CCCB. Such an interest should not be construed to insulate CCCB from claims by CCCB's creditors or contracting parties. The Receiver has no standing to seek equitable relief to prevent the Prospect Entities from pursuing their rights under the LLC Agreement. To hold otherwise would be to enjoin *all* actions of *all* third-parties against CCCB simply because the Receiver holds a contingent interest in CCCB; a conclusion that would stretch equity beyond its limits.

B. Even if the Court Finds That the Order Enjoins Suits Against CCCB, it Should Nonetheless Grant the Prospect Entities Relief from the Order to File the Lawsuits.

Even if the Court finds that the Order enjoins suits against CCCB and that the Lawsuits are within the equitable jurisdiction of the Court, it should nonetheless grant the Prospect Entities relief from the Order and allow them to pursue their claims against CCCB.

While this Court has yet to expressly identify factors that would warrant relief from a receivership stay, the Ninth Circuit, in *SEC v. Wencke*, 622 F.2d 1363, 1373-74 (9th Cir. 1980) ("*Wencke I*") and *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) ("*Wencke II*"), addressed the standard to be employed by a federal court in determining whether to lift a receivership stay.[10] In *Wencke II*, the Ninth Circuit held that a district court should consider three factors to determine whether lifting a receivership stay is appropriate:

> (1) whether refusing to lift the stay genuinely preserves the *status quo* or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the

[10] This Court has previously noted that "[i]n Rhode Island, the Court looks to the Bankruptcy Code for guidance in receivership matters." *Site, LLC v. Matthew Realty Corp.*, 2016 R.I. Super. LEXIS 149, at *3 (R.I. Super. Ct. Dec. 27, 2016) (citing *Reynolds v. E & C Assocs*., 693 A.2d 278, 281 (R.I. 1997)). However, where, as here, both this Court and a federal court may sit in equity in receivership matters, the federal court's jurisprudence regarding relief from a receivership stay may be more applicable than looking to the Bankruptcy Code.

> receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

742 F.2d at 1231.[11] The *Wencke II* test "simply requires the district court to balance the interest of the Receiver and the moving party . . . . [T]he interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *United States v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005) (citing *SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985)). The *Wencke II* standard has been widely accepted in application and has been adopted by courts in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.[12] In addressing a receivership stay and whether lifting a stay is appropriate, a court noted that

> the purpose of imposing a stay of litigation is clear. A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant. Nevertheless, an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary *so that litigants are not denied a day in court during a lengthy stay*.

Greentree Capital, 2014 U.S. Dist. LEXIS 79277, at *11 (emphasis added).

a. The status quo.

When considering the status quo, the Court should "essentially balance[] the interests in preserving the receivership estate with the interests" of the Prospect Entities. *Stanford Int'l Bank*

[11] While these factors were specifically crafted to apply to SEC-related receiverships, the overall rationale set forth by the courts applies to the case at bar.

[12] *See SEC v. Stanford Int'l Bank Ltd.*, 465 Fed. App'x. 316, 320, (5th Cir. 2012); *Chizzali v. Gindi*, 642 F.3d 865, 872-73 (10th Cir. 2011); *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005); *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985); *United States SEC v. N.D. Devs., LLC*, 2016 U.S. Dist. LEXIS 94016, *8 (D.N.D. Mar. 10, 2016); *United States v. JHW Greentree Capital, L.P.*, 2014 U.S. Dist. LEXIS 79277, *11 (D. Conn. June 11, 2014); *Belsome v. Rex Venture Group, LLC*, 2013 U.S. Dist. LEXIS 181160, *3, (W.D.N.C. Dec. 30, 2013); *SEC v. One Equity Corp.*, 2010 U.S. Dist. LEXIS 124013, *19 (S.D. Ohio Nov. 23, 2010); *FTC v. 3R Bancorp*, 2005 U.S. Dist. LEXIS 12503, *5 (N.D. Ill. Feb. 23, 2005)

Ltd., 424 F. App'x at 341; *see also Schwartzman v. Rogue Int'l Talent Grp., Inc.*, 2013 U.S. Dist. LEXIS 16493 (E.D. Pa. Feb. 7, 2013) (first factor requires court "to balance the Receiver's interest in maintaining the status quo with any injury the moving party may suffer if the stay remains in place"); *U.S. v. ESIC Capital, Inc.*, 675 F. Supp. 1462, 1463 (D. Md. 1987) (court must assess "the competing interests of the injury to the moving party versus preserving the status quo").

Here, the status quo is that the Receiver has placed a number of issues into dispute in litigation instituted by the Receiver *after* the injunctive provisions of the Order allowed the Receiver to investigate unimpeded. The litigation commenced by the Receiver and the Receiver's proposed settlement with CCCB give rise to other disputes that must be resolved. Even the Special Counsel represented to the Court that all of these issues have to be resolved. Accordingly, it would do substantial injury to the Prospect Entities if the Receiver were able to continue to litigate these issues while the Prospect Entities were unfairly restricted by the injunctive provisions of the Order. In contrast, the status quo will be maintained because even if the Lawsuits proceed to judgment in favor of the Prospect Entities, the Receiver's interest in CCCB will remain unaffected.

b. The time at which the motion for relief is made.

The timing factor is fact-specific and "based on the number of entities, the complexity of the scheme, and any number of other factors." *Stanford Int'l Bank Ltd.*, 424 F. App'x at 341; *see also SEC v. Wing*, 599 F.3d 1189, 1197 (10th Cir. 2010) ("the timing factor is case-specific"). The Ninth Circuit, in *Wencke I*, explained that

> [w]here the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim. As the receivership progresses, however, it may become less plausible for

> the receiver to contend that he needs more time to explore the affairs of the entities. The merits of the moving party's claim may then loom larger in the balance.

Wencke I, 622 F.2d at 1373-74. Similarly, the Third Circuit has concluded that

> [f]ar into a receivership, if a litigant demonstrates that harm will result from not being able to pursue a colorably meritorious claim, we do not see why a receiver should continue to be protected from suit. On the other hand, very early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver's duties.

Acorn Tech. Fund, L.P., 429 F.3d at 443-44.

Generally, courts are reluctant to lift litigation stays early in a receivership where lifting a stay would disrupt the receiver's duty to organize and understand its assets. *JHW Greentree Capital, L.P.*, 2014 U.S. Dist. LEXIS 79277, at *20. However, "a lift of the stay is more palatable later in a receivership's lifetime, after the receiver has had sufficient time to conduct its duties." *Id.*; *see S.E.C. v. Provident Royalties, L.L.C.*, 2011 U.S. Dist. LEXIS 74304 (N.D. Tex. July 7, 2011) (timing factor weighed heavily in favor of lifting stay where receivership was almost two years old, receiver had marshaled almost all receivership assets and had proposed a plan of distribution); *SEC v. Private Equity Mgmt. Grp., LLC*, 2010 U.S. Dist. LEXIS 126337, (C.D. Cal. Nov. 18, 2010) (second factor cut against receiver where receivership was well over one year old and receiver had progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court).

Here, this receivership is not at a stage where the Lawsuits should be enjoined. The Receiver has had ample time to collect and assume control over the estate, evidenced by the numerous subpoenas Special Counsel has issued; the Federal Court Action; a motion to intervene in a *cy pres* proceeding; the initiation of a state suit; the negotiated settlement with several parties, resulting in two settlement agreements, and over one year since the receivership was

initiated. In essence, the Receiver, after an exhaustive investigation, has brought action against all persons and/or entities that the Receiver thinks are liable to the Receivership Estate. The time and the course of the receivership is such that the Receiver has concluded a lengthy investigation and has instituted wide-ranging litigation that requires a number of issues to be addressed. In this instance, the Receiver has had over a year with complete subpoena powers to determine how to proceed. The Receiver has determined to proceed with the Federal Court Action and the contingent settlement thereof with CCCB. Indeed, it was only because the Receiver initiated litigation and then entered into the Settlement Agreement with CCCB that the claims that are the subject of the Lawsuits ripened. Accordingly, the Court should grant the Prospect Entities relief from the Order.

c. The merits of the underlying claims.

In considering the merits of the movant's claims, a "court need only determine whether the party has colorable claims to assert which justify lifting the receivership stay." *Acorn Tech.*, 429 F.3d at 449. The more meritorious a movant's underlying claim, the more heavily this factor will weigh in the movant's favor. *See Wencke I*, 622 F.2d at 1373 ("Where the claim is unlikely to succeed (and the receiver therefore likely to prevail), there may be less reason to require the receiver to defend the action now rather than defer its resolution").

The Rhode Island Supreme Court, in *Reynolds v. First NLC Fin. Servs., LLC*, has determined with reference to an automatic stay provision in the bankruptcy context that granting a relief from stay "is merely a summary proceeding of limited affect," which is "determination of whether the parties seeking relief has a colorable claim to the property of the estate," and a decision on a motion for relief from stay "is not a determination of the validity of those claims, but merely a grant of permission from the Court allowing the creditors to litigate its substantive claims elsewhere without violating the automatic stay." 81 A.3d 1111, 1117 (R.I. 2013).

Here, there are a number of "colorable" disputes that must be resolved in accordance with the dispute resolution provisions of the LLC Agreement, including the following:

1. The "purposes" of Prospect Chartercare are specifically related to a community healthcare mission. *See* LLC Agreement at § 3.1. CCCB, as a member of Prospect Chartercare and its designees to the Board of Directors of Prospect Chartercare, who exercise fifty percent voting control, have to exercise their duties and fiduciary obligations to advance those purposes, not the purposes of the Receiver in the Federal Court Action.
2. There is a dispute as to whether the contingent transfer of beneficial rights to the Receiver violates Article 13 of the LLC Agreement. Moreover, the Receiver has argued that the transfer meets the requirements of the LLC Agreement because it is to an "affiliate," which Prospect East disputes. However, even if one were to put that issue aside, the transfer still had to secure regulatory approval. *See* LLC Agreement at § 13.1(c).
3. Prospect Chartercare and Prospect East have more than a "colorable" claim to indemnity, under the LLC Agreement and the APA.

Accordingly, as the Prospect Entities have colorable claims against CCCB, the Court should grant the Prospect Entities relief from the Order to initiate the Lawsuits against CCCB.

C. The Court Should Also Grant Prospect Chartercare Leave to File the Administrative Petitions Because the RIAG and RIDOH's Involvement is Necessary; or the Court Should Order that the Receiver Seek Appropriate Regulatory Input or Decisions Relative to CCCB Transferring its Interest to the Receiver.

For the same equitable balancing arguments made above, Prospect Chartercare should be entitled to relief from the injunctive provisions of the Order to request that the regulatory

authorities determine the preclusive effect of the HCA and CEC decisions and whether the contingent, beneficial transfer agreed to by and between CCCB and the Receiver requires regulatory approval.

As to the first issue regarding preclusive effect, CCCB has repeatedly admitted that the "Acquiror" in the 2014 Sale (Prospect, Prospect East, Prospect Chartercare, and others) did not acquire the Retirement Plan or any Plan liability. In fact, CCCB advocated for such an approval. Thus, it is critical that a process be advanced to determine the preclusive effect of that regulatory process that was clearly quasi-judicial. *See Town of Richmond v. Wawaloam Reservation, Inc.*, 850 A.2d 924, 933-934 (R.I. 2004).

As to regulatory approvals, CCCB was bound to secure necessary regulatory approvals for any transfer of its interest. *See* LLC Agreement at §13.1(c). Moreover, a transfer of CCCB's rights to exercise fifty percent of the voting authority on Prospect Chartercare's Board of Directors as structured in this specific HCA and CEC decisions is a "conversion" as that term is defined under the HCA. *See* R.I. Gen. Laws § 23-17.14-4(6). At oral argument on the Contempt Motion, the Special Counsel noted Prospect Chartercare's argument that CCCB and/or the Receiver did not exhaust administrative requirements for the sought remedy. Thus, the Special Counsel argued that such a position could be an "affirmative defense" in the Federal Court Action. However, the Receiver cannot seek to abrogate regulatory authority in that fashion. The regulatory issues that have arisen as a result of the Receiver's actions must be resolved, and must be resolved by the appropriate state regulatory agencies, not by a federal court.

For these reasons, a balancing of the equities requires that Prospect Chartercare be granted such relief from the injunctive provisions of the Permanent Receivership Order.

CONCLUSION

Because the Order does not preclude the Lawsuits against CCCB, the Prospect Entities respectfully provide notice to the Court that they intent to initiate the Lawsuits. However, to the extent that the Court finds that the Order enjoins the Lawsuits, the Court should nonetheless grant the Prospect Entities relief from the Order to file the Lawsuits. Further, the Court should provide the Prospect Entities relief from the Order to file the Administrative Petitions, or instruct the Receiver to seek the input or appropriate decisions from the RIDOH and RIAG in connection with it taking a beneficial interest in CCCB.

[Signature page to follow]

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2018, the within document was electronically filed through the Rhode Island Superior Court Case Management System by means of the EFS and is available for downloading by all counsel of record.

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