No. 13-cv-348

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

District of Columbia,
Department of Insurance, Securities and Banking,
Petitioner and Appellee,

vs.

D.C. Chartered Health Plan, Inc.,
Respondent and Appellee,

D.C. Healthcare Systems, Inc.,
Party in Interest and Appellant.

On Appeal from an Order Approving an Asset Purchase Agreement
Superior Court Civil Division Civil Action No. 2012-CA-8227-2
The Honorable Melvin R. Wright

MOTION FOR AN IMMEDIATE STAY PENDING APPEAL

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I. INTRODUCTION

Party in Interest D.C. Healthcare Systems, Inc. (DCHSI) seeks a stay pending its appeal from the trial court's March 1, 2013 final "Order Approving The Asset Purchase Agreement, Plan of Reorganization and Related Matters" (March 1 Order). DCHSI sought a stay of the March 1 Order from the Superior Court, and appealed that order on April 1, 2013. Petitioner-Appellee opposed the stay motion, which the trial court denied on April 2, 2013. The trial court concluded that DCHSI did not show irreparable harm absent a stay or a likelihood of success on the merits. DCHSI, however, will be irreparably harmed absent a stay and should prevail on appeal. A stay is necessary to preserve the status quo pending appeal and to prevent irreparable injury. Petitioner-Appellee opposes this stay motion.

DCHSI is a creditor and the sole shareholder of D.C. Chartered Health Plan, Inc. (Chartered), an HMO. Chartered is DCHSI's sole source of revenue. In October 2012, Chartered was placed into rehabilitation. The Rehabilitator's mandate was to attempt to reform and revitalize Chartered.[1] Under the Rehabilitation Act, if a rehabilitator determines that the insurer should be reorganized or otherwise transformed, he must first prepare a plan to effect the changes and seek court approval; the court may prescribe notice and hearings and then approve, disapprove or modify the plan. *See* D.C. Code § 31-1312(e). The plan must be "fair and equitable to all parties concerned" and may not be carried out until it is approved by the Court. *Id.* But Chartered's Rehabilitator disregarded his fundamental obligation to *rehabilitate* Chartered in favor of an unauthorized *liquidation*. That liquidation took several forms:

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[1] *See* D.C. Code § 31-1312(c); volume 1-Appellant's Appendix ("AA")-pages 9-10 (Rehabilitator has "authority to take such action as deemed necessary or appropriate to reform and revitalize Chartered"; "the Rehabilitator [is to] submit a plan of rehabilitation of Chartered for Court approval if one is feasible" or, if "a rehabilitation plan is not feasible," he "shall submit a report to the Court which states the basis for such determination").

- The Rehabilitator's linchpin liquidating step—taken just six weeks into the rehabilitation proceeding (and without prior notice to the court or DCHSI, as required by Chartered's articles of incorporation)—was to prevent Chartered from bidding on the renewal of the five-year Department of Health Care Finance ("DHCF") Contract to provide healthcare services to Medicaid and Alliance beneficiaries. That decision stripped Chartered of its only business and source of income, and by itself was an act of liquidation.

- The Rehabilitator put Chartered's resources and experience behind competitor AmeriHealth's bid on the DHCF Contract, then spent three months negotiating the transfer of Chartered's key assets to AmeriHealth. The Rehabilitator tied Chartered's fortunes to AmeriHealth to the exclusion of all others, having agreed not to seek or even entertain better offers. This risked leaving Chartered with nothing if AmeriHealth did not win the contract. The AmeriHealth transaction is not "fair and equitable" as required.

- The Rehabilitator never genuinely attempted to cure the problem that led to Chartered's rehabilitation—a deficiency in its "risk-based capital." Chartered satisfies the statutory minimum net worth requirement, but because the District has not paid over $60 million the Rehabilitator has determined the District owes Chartered, Chartered remains undercapitalized (the District's debt is a multiple of the deficiency). The Rehabilitator never demonstrated that Chartered's depleted capital could not be replenished.[2]

As a matter of law, liquidation is a last resort. Liquidation is improper absent all reasonable efforts to rehabilitate. Moreover, the Rehabilitator improperly began liquidating without first seeking court approval. Even if the Rehabilitator had quickly determined that

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[2] *See* D.C. Code § 31-1314 *et seq.* (Commissioner may petition for liquidation order if "*further* attempts to rehabilitate an insurer would *substantially* increase the risk of loss to creditors, policyholders, or the public, or would be *futile*") (emphases added).

rehabilitation was somehow futile—notwithstanding Chartered's strong track record and the District's over $62 million debt to Chartered—he nevertheless is forbidden by statute from unilaterally implementing a liquidation. Rather, he must seek prior court approval, and give creditors and parties in interest the opportunity to be heard.

The trial court's order rewarded the Rehabilitator's improper conduct and accepted the Rehabilitator's after-the-fact liquidation plan without (i) adequate justification, (ii) notice to creditors, (iii) permitting DCHSI to brief the merits, let alone to take discovery and (iv) a factual record showing that liquidation is appropriate and that the paltry $5 million to be paid by AmeriHealth represents fair value. The Rehabilitator also violated Chartered's governing corporate documents, which the Rehabilitation Order did not supplant. The Rehabilitation Order gives the Rehabilitator the power of Chartered's board; it does not give powers greater than those held by the board. Chartered's articles of incorporation provide that board-level actions, such as the fundamental transformation the Rehabilitator implemented while refusing to consult with DCHSI, are not effective unless approved by DCHSI. The Rehabilitator thus also usurped DCHSI's corporate authority.

The Rehabilitator's actions define a liquidation, the "process of converting assets into cash," and are antithetical to a rehabilitation, which is the "process of reorganizing a debtor's financial affairs ... so that [it] may continue to exist as a financial entity." Black's Law Dict. 1080, 1451 (9th ed. 2009); *see also* 43 Am. Jur. 2d Insurance § 99. Liquidation was improper, in view of the facts that Chartered for over 25 years fulfilled its responsibility to Medicaid and Alliance enrollees and to pay the complex network of providers it developed, and suffered a diminution of capital surplus only because, as the Rehabilitator himself contends, DHCF unilaterally imposed over $62 million in new costs on Chartered that it wrongfully has failed to

pay. Chartered would have more than enough capital, and not be subject to rehabilitation, if only the District would pay what it owes.

DCHSI moves this Court to stay the March 1 Order because the Rehabilitator's liquidating actions and the proposed AmeriHealth transaction violate the rehabilitation order and the Rehabilitation Act. The liquidation of Chartered irreparably harms DCHSI by destroying its entire business, and violates its rights as Chartered's sole shareholder. The irreparable harm is more than mere economic loss remediable by monetary damages—the injury inflicted here *destroys* DCHSI's very existence. *See D.C. v. Group Ins. Admin.*, 633 A.2d 2, 23 (D.C. 1993).

To ensure that Chartered's rehabilitation is conducted within the terms of the Rehabilitation Order, the law governing rehabilitations and Chartered's articles of incorporation, and to remedy the ongoing and irreparable harm to DCHSI, this Court should stay and then reverse the March 1 Order. Specifically, this Court should:

(1) stay the trial court's March 1 Order (Approving the Asset Purchase Agreement, Plan of Reorganization and Related Matters) pending appellate review;

(2) enjoin the Rehabilitator from liquidating Chartered or otherwise exceeding the limits of his authority under the Insurers Rehabilitation and Liquidation Procedures Act, D.C. Code § 31-1301 et seq. and the October 19, 2012 order placing Chartered into rehabilitation;

(3) stay (or vacate or void) all of the Rehabilitator's liquidating actions, including any and all purported agreements with AmeriHealth; and

(4) require the Rehabilitator to comply with Chartered's Restated Articles of Incorporation by obtaining DCHSI's advance approval of any decision that would transform Chartered's business or have a material affect on DCHSI's interest in Chartered.

II. STATEMENT OF FACTS

A. Chartered, an HMO dependent on the DHCF Contract, is taken over by a rehabilitator

Chartered is a licensed District of Columbia HMO that since 1987 has been an incumbent to the DHCF Contract, which is Chartered's only business and source of income. 1-AA-2-3, 14. DCHSI is Chartered's creditor, as its landlord, and sole shareholder; Chartered is DCHSI's sole source of revenue. 2-AA-349. Under Chartered's articles of incorporation, "[n]o action of the Board of Directors shall take effect unless it has been approved by the unanimous vote of the outstanding shares entitled to vote." 2-AA-372.

The DHCF Contract is DHCF's largest contract, serving over 100,000 members a month. 1-AA-376. Chartered developed "a significant provider network incorporating primary, urgent and emergency care health services," giving "both Medicaid and Alliance beneficiaries ... access to the full range of health care services they may need to address their medical needs." *Id.*

In 2011, DHCF and DISB increased their oversight of Chartered based on concerns over the adequacy of Chartered's risk-based capital reserves. As reflected in Chartered's audited financial statements, Chartered had the following total stockholder's equity from 2004 to 2011: $11,843,556 (2004); $15,945,518 (2005); $20,717,538 (2006); $21,312,995 (2007); $21,059,187 (2008); $13,656,951 (2009); $17,444,611 (2010); $5,949,445 (2011). 1-AA-34; 2-AA-382-461. The 2011 decrease, an aberration, is hardly surprising given that the District owes Chartered over $62 million—because the District expanded Chartered's covered population without adequate compensation, and otherwise underpaid Chartered for amounts due under the DHCF Contract.[3]

[3] 3-AA-588 (developing capitation rates for July 2010–April 2011, noting that "[t]he projections ... do not consider the additional enrolment related to the coverage expansion up to 133% of the federal poverty level (FPL)"); 3-AA-615 (Rates Effective May 2012, noting that "childless adults were added ... effective July 2010 for individuals up to 133% the [FPL]" and those with "incomes between 134% and 200% of the FPL [] were enrolled ... effective December 2010).

Based on Chartered's financial statement as of September 30, 2012, which counted only $32 million of the more than $62 million claim and showed approximately $9 million in surplus capital, Chartered's current capital and surplus, or stockholder's equity, now is over $39 million if the entire debt were included. 1-AA-56, 74-76. This is substantially above Chartered's historical capitalization in years when its DHCF Contract was continually renewed.

In spring 2012, the DISB Commissioner and DHCF Director began to apply substantial political pressure on Chartered and DCHSI. First, they insisted that DCHSI's sole shareholder, Jeffrey Thompson, step down as chairman of Chartered's board of directors. Second, they insisted that DCHSI agree to sell Chartered. Bowing to that pressure, Mr. Thompson stepped down as chairman of Chartered's board and DCHSI agreed to pursue the sale of Chartered.

DISB retained, at Chartered's expense, Daniel Watkins, who later became the Special Deputy to the Rehabilitator (1-AA-22), and Faegre Baker Daniels, the law firm that now represents him.[4] 1-AA-12. DISB did this over Chartered's objections based on Mr. Watkins' conflict of interest and those of his chosen law firm: The Deputy Rehabilitator's brother, Robert Watkins, served as Chartered's Chief Operating Officer for almost four years (from December 2007 to September 2011) and as COO was directly responsible for conduct subject to the Rehabilitator's review (e.g., in rate-setting, contract negotiations and pharmacy management). The Rehabilitator thus is directly involved in reviewing the practices and decisions of his own brother. 2-AA-518. Further, the Rehabilitator's counsel, Faegre Baker Daniels, advised direct competitors of Chartered (including AmeriHealth) that had expressed

[4] By law, the DISB Commissioner is the Rehabilitator. He appointed Mr. Watkins to carry out the Rehabilitator's powers; here, "the Rehabilitator" refers to both the Commissioner and his deputy unless context requires otherwise.

interest in acquiring Chartered and competing for the DHCF Contract, and that could gain an advantage if Chartered no longer could service the D.C. market. 2-AA-519, 526.

Although the Rehabilitation Act requires that the "compensation of the special deputy [and] counsel ... be fixed by the Commissioner, with the approval of the court," D.C. Code § 31-1312(a), the record does not reflect that the Rehabilitator obtained Court approval for the compensation of the Deputy Rehabilitator or his counsel, despite the noted conflicts issues.

In October 2012, the DISB Commissioner and the DHCF Director approached Chartered's board to seek its consent to submit Chartered to rehabilitation. 2-AA-513. Under Chartered's articles of incorporation, that required DCHSI's approval. The regulators represented to DCHSI that the Rehabilitator would provide information to and consult and cooperate with DCHSI. 2-AA-346. DCHSI consented—that is, both Chartered and DCHSI consented to a rehabilitation, not to a liquidation.

In the context of discussing Chartered's potential sale, the Rehabilitator recognized that "Chartered required a new Medicaid contract with the District to be a viable acquisition candidate." 1-AA-14. Also, in testimony shortly after this proceeding started, the Rehabilitator asserted that "a sale and change of ownership, if feasible, is the best and safest outcome for everyone," pointedly stating: "I do believe that Chartered is a far more attractive prospect in rehabilitation as it now has a far better chance to get its all-important city Medicaid contract renewed." 2-AA-513. This indication that Chartered would seek the award of the new DHCF Contract is consistent with the Rehabilitation Order, giving the Rehabilitator the "[a]uthority to accept new or renewal business or extension of Chartered's contracts." 1-AA-9. The Rehabilitator expressed that it was important for him to "conduct an orderly, fair and open

process of evaluating the many well capitalized companies and people who appear to see value in Chartered as an ongoing concern." 2-AA-514.

The current DHCF Contract was to expire on April 30, 2013 and the bidding process on the new five-year DHCF Contract (the "Medicaid RFP") was to begin in early November 2012, with initial bids due in early December 2012. Knowing, as he testified, that there were "many well capitalized companies" with an interest in purchasing Chartered outright and given the importance of the services that Chartered was providing to over 100,000 District residents, the Rehabilitator could have taken a number of steps to delay the bidding schedule to permit "an orderly, fair and open process" to evaluate those companies. For example, the Rehabilitator could have asked the Director of DHCF, to extend the bid date for the new contract, particularly since they had worked hand in hand to have Mr. Thompson resign, to have DCHSI seek to sell and to bring about the consensual rehabilitation. That failing, Chartered could have timely submitted the response to the Medicaid RFP that it had been preparing for some time (2-AA-464, 513, 526) while continuing to identify and negotiate with prospective bidders from a position of strength, that is, as a company with every intention of continuing its business. If needed, the Rehabilitator could have asked DHCF for an extension or sought judicial relief. Instead, he accepted the schedule and (as described below) conducted a two-day bidding process to sell Chartered, after which he commenced to liquidate Chartered.

B. Rather than rehabilitate Chartered, the Rehabilitator begins to liquidate it

The Rehabilitation Order vests the Rehabilitator with "all appropriate and necessary powers provided under the Insurers Rehabilitation and Liquidation Procedures Act, D.C. Code § 31-1301 et seq. (the "Rehabilitation Act")," and specifically gives him "all powers of the directors, officers and managers of Chartered"; control of Chartered's assets and the power to "administer them under the general supervision of the Court"; the "[a]uthority to take such action

as deemed necessary or appropriate to reform and revitalize Chartered"; and the "[a]uthority to accept new or renewal business or extension of Chartered's contracts." 1-AA-8-9. The Rehabilitation Order also required that "the Rehabilitator submit a plan of rehabilitation of Chartered for Court approval, if one is feasible," and if he determines one is not, to "submit a report to the Court which states the basis for such determination." 1-AA-10.

Neither the Rehabilitation Act nor the Rehabilitation Order negates Chartered's governing corporate documents. Indeed, the Rehabilitation Act provides that an insurer's disregard for its governing documents can justify ordering the insurer into rehabilitation. *See* D.C. Code § 31-1310(9) (insurer's willful violation of its articles of incorporation or bylaws constitutes grounds for rehabilitation). Accordingly, although the Rehabilitator has the board's powers, any exercise of those powers is ineffective unless approved by DCHSI.

On Friday, November 9, 2012, the Rehabilitator's retained investment banker solicited interested parties "to respond to a preliminary request for information in connection with ... a potential acquisition and recapitalization of [Chartered]." 2-AA-463. All responses were due by 5 p.m. November 14, 2012, just two business days after the letter was sent, and "a limited number" of responders then would be selected to continue in the process and submit a binding letter of intent by December 1, 2012. 2-AA-464.

Bidders were required to submit "a detailed response" in two days setting forth: (1) the bidder's ability to fund an estimated $30 million in capitalization with the expectation that "any Transaction will be effected via the sale of 100% of the issued share capital of [Chartered]" and (2) "your proposed sources of financing," including a "summary financing plan" and "the names and contact information of proposed third-party funding sources or partners and the steps and timing required to secure the necessary funds." 2-AA-464. Bidders also would have to submit "a binding letter of intent prior to [Chartered] submitting a response to the [Medicaid] RFP" and identify all due diligence required "prior to executing a binding letter of intent" on December 1.

Id. (also requiring bidders to agree to Chartered's response to the Medicaid RFP).

On February 22, 2013, DCHSI for the first time saw a non-binding letter agreement dated November 30, 2012, reflecting that Chartered had agreed to provide its "resources, assets, and know-how in support of" AmeriHealth's own RFP bid in exchange for $5 million, to be paid if AmeriHealth "is chosen as a Service Provider under the [Medicaid] RFP and commences operations thereunder." 2-AA-468.

Just after responses to the Medicaid RFP were due, the Rehabilitator revealed that—without first submitting to this Court either a plan of rehabilitation or the basis for a determination that rehabilitation was futile—he had caused Chartered not to respond to the Medicaid RFP, but instead had entered into a letter of intent for a transaction with AmeriHealth, and that AmeriHealth had responded to the Medicaid RFP. 1-AA-472. In fact, as was later disclosed, by the week of November 26, 2012, the Rehabilitator had decided to enter into a non-binding letter of intent with AmeriHealth and to work with AmeriHealth "to complete a response to the DHCF RFP in [AmeriHealth's] name (utilizing key Chartered personnel and experience in the response) and to negotiate a definitive agreement with [AmeriHealth]." 1-AA- 16.

The Rehabilitator selected AmeriHealth even though, contrary to the requirements of the Chartered RFP, it did not submit a binding letter of intent, did not agree to recapitalize Chartered and did not approve a response by Chartered to the Medicaid RFP. Moreover, AmeriHealth did not provide $30 million in financing to Chartered. There is no indication that other bidders were extended the same opportunity to bid on terms contrary to those announced in the Chartered RFP; indeed, the Rehabilitator has never disclosed the other bids, so there is no way to evaluate how AmeriHealth's offer compares. Nor is there any indication that the Rehabilitator performed any analysis of the fair value of Chartered's assets; no such analysis was presented to the court.

Thus, less than six weeks after this rehabilitation proceeding was commenced, the Rehabilitator had abandoned any effort to continue Chartered's business and had taken steps to sell off its parts—setting into motion an unauthorized liquidation plan—without the approval of DCHSI and without the required approval by the court.

C. DCHSI unsuccessfully protests the DHCF bidding process

In December 2012, DCHSI filed a bid protest before the D.C. Contract Appeals Board challenging the bidding process regarding the renewal of the DHCF Contract. 2-AA-517-33. As stated, the Rehabilitator had prevented Chartered from competing, even though DCHSI was led to believe that Chartered would compete when DCHSI consented to Chartered's rehabilitation. 2-AA-346.

DCHSI's bid protest sought to have the Medicaid RFP canceled and resolicited based on the Rehabilitator's and his outside counsel's conflicts of interest and illegal restraints of trade and collusive bidding. 2-AA-527-30. The conflicts of interest violated both the D.C. Code and the D.C. Rules of Professional Conduct, and may have improperly influenced the decision to "no bid" the contract on Chartered's behalf. *Id.* The District successfully moved to dismiss the bid protest on jurisdictional and standing grounds. 2-AA-535, 579.

D. The Rehabilitator's First Status Report shows that Chartered met minimum net worth requirements at the end of 2011

In January 2013 the Rehabilitator filed his First Status Report, claiming that one of his "overarching goals" has been to "preserve any residual value for Chartered's shareholder." 1-AA-13, 14 (acknowledging "Chartered required a new Medicaid contract with the District to be a viable acquisition candidate"). He also attempted to justify his previous actions in preventing Chartered from bidding on the DHCF Contract, using Chartered's employees to aid AmeriHealth in preparing its bid for the contract and, contrary to the requirements in the Chartered RFP, accepting AmeriHealth's non-binding letter of intent to buy Chartered's assets when other bidders were required to submit binding letters of intent to capitalize Chartered.

The Rehabilitator stated that he was told by the DHCF Director that DHCF would not award the DHCF Contract to Chartered unless Chartered had a new owner and was out of rehabilitation by mid-January 2013, which conditions the Rehabilitator believed could not be satisfied. 1-AA-14. The DHCF Director thus not only was involved in pressuring Chartered to

consent to rehabilitation, he then purported to impose new bid "requirements" on Chartered that are not found in the Medicaid RFP or otherwise elsewhere.

The First Status Report also addressed Chartered's recently-completed audited financial statement as of December 31, 2011. 1-AA-13. The audit report reflects Chartered reported a reduction in capital and surplus, but also notes that Chartered met or exceeded the minimum net worth requirement as of the end of 2011. 1-AA-13, 43.

E. The Rehabilitator's Second Status Report also seeks an order approving Chartered's sale to AmeriHealth

In February 2013, the Rehabilitator filed a Second Status Report and a Petition seeking expedited approval to transfer Chartered's principal assets to AmeriHealth. 1-AA-55. The Second Status Report discusses Chartered's financial results as of September 30, 2012, showing Chartered's capital reserve had increased to $9 million, up 50% from $5.9 million at year-end 2011. 1-AA-56. The Rehabilitator also explained that the District owes Chartered $62 million, plus interest (rather than the mere $32 million booked as of September 30, 2012). 1-AA-56-57. This debt arose because the District failed to pay Chartered for certain costs the District had imposed, primarily due to the District's mid-2010 unilateral transfer of certain high-risk populations to Chartered's rolls with no rate adjustment. This resulted in a dramatic increase in Chartered's costs, which the District is obligated to pay under the DHCF Contract, but the District's reimbursement rates were unadjusted and actuarially unsound. 1-AA-57.

If the Rehabilitator is correct, then Chartered's current stockholders' equity based on the $62 million claim (without regard to interest) would increase by $30 million from the $32 million accounted for in September, and thus from $9 million to over $39 million. This is substantially in excess of Chartered's stockholder's equity in any prior year, when its DHCF Contract was continually renewed.

If, as it appears, Chartered has shareholder equity of $39 million (indeed, even if Chartered were to recover substantially less than the amount the Rehabilitator contends is due), Chartered's capitalization is at least equal to what it has been throughout the District's

continuous selection of Chartered during renewals of the DHCF Contract.

The Rehabilitator also sought expedited approval of an asset purchase agreement with AmeriHealth. Chartered represents in the proposed Agreement that it "has all necessary and corporate power and authority to enter into this Agreement" and that the delivery, performance and consummation of the agreement by Chartered "ha[s] been duly authorized by all requisite corporate action." 1-AA-104-05. But this is false, because the Rehabilitator never obtained DCHSI's consent, as required by Chartered's articles of incorporation. This representation is, however, consistent with the Rehabilitator's refusal to provide DCHSI with any meaningful information regarding the terms of this proposed transaction before filing the Second Status Report with the court, despite DCHSI's willingness to enter into a non-disclosure agreement. 2-AA-345-47; 3-AA-805-07. As the Rehabilitator stated in an affidavit in the Bid Protest, he believes he "was under no obligation under D.C. law or the Rehabilitation Order to consult with or inform [DCHSI] ... prior to taking action." 2-AA-476.

The asset transfer agreement would consummate the Rehabilitator's decimation of Chartered and, in turn, DCHSI. 2-AA-349. In effect, the proposed agreement contemplates the transfer of substantial Chartered assets to AmeriHealth for $5 million.[5] These assets include not only the DHCF Contract and provider contracts (subject to opt-out), but also Chartered's phone numbers and trade name, certain intellectual property rights, all furniture, equipment, supplies, machinery, tools, vehicles and office equipment, enroller records, claims data, price lists, supplies and sales records, financial and accounting records and more. 1-AA-96-97.

The proposed agreement is subject to numerous closing conditions, including that AmeriHealth be awarded the next DHCF Contract. 1-AA-135. If the Rehabilitator's gamble had not been successful—and despite collusion, AmeriHealth failed to win the contract—Chartered

[5] The proposed agreement's stated purchase price is $5 million, subject to repayment under an indemnification provision. 1-AA-100, 138. Beyond that, the $5 million already was required to be paid under the November 30, 2012 letter agreement for helping AmeriHealth prepare its bid. 2-AA-468. As such, if AmeriHealth wins the Medicaid RFP, AmeriHealth would receive Chartered's assets *for no additional payment.*

not only would have lost its own chance to win the DHCF Contract and the opportunity to continue as a going concern, it also would be left without a buyer and without substantial value to attract another buyer. 1-AA-14 ("Chartered required a new Medicaid contract with the District to be a viable acquisition candidate"); *see also* 1-AA-134-136 (additional closing conditions).

The Rehabilitator admits, perhaps unwittingly, that he is liquidating Chartered in stating that his next step would be to "wind down Chartered's remaining operations," marshal the remaining assets, and apply those assets to outstanding liabilities. 1-AA-62; 2-AA-586 (noting that if the AmeriHealth transaction does not close, the Rehabilitator "would continue to marshal Chartered's assets, resolve Chartered's liabilities and wind down Chartered's affairs after the expiration of its current Medicaid contract"). This seems to be precisely what D.C. Council member David Catania, who formerly chaired the Council's Health Committee, wanted when he stated less than a week into the rehabilitation proceeding: "It's finished, as far as I'm concerned. There just is simply no way [Chartered] resurrects itself from receivership." *See* Tom Howell Jr., Chartered Health Plan's finances draw scrutiny, Washington Times, Oct. 25, 2012, at http://m.washingtontimes.com/news/2012/oct/25/chartered-health-plans-finances-draw-scrutiny/?page=all; *see also* Mike Debonis, Health Plan Takeover in DC Eases Concerns but Doesn't Erase Them, Washington Post, Oct. 22, 2012, available at http://www.washingtonpost.com/local/dc-politics/health-plan-takeover-in-dc-eases-concerns-but-doesnt-erase-them/2012/10/22/333d15c4-1c8d-11e2-9cd5-b55c38388962_story.html (quoting Chairman Catania as stating "This receivership is the epitaph for Chartered.").

The Rehabilitator also claims that his plan is "fair and equitable for all parties concerned" and that it is the "best way to [] preserve residual value, if any, for Chartered's sole shareholder." 1-AA-64. The court in its March 1 Order agreed that the plan is fair and equitable based on the Rehabilitator's mere assertion. The Rehabilitator did not provide, and the trial court erroneously did not require, any facts showing that the consideration paid was fair or that, after a reasonable effort, no one was willing to pay more. Indeed, the court approved the transaction at a status conference that DCHSI requested to establish a briefing schedule; creditors were not provided

notice, and DCHSI was not permitted to file any substantive opposition, let alone take discovery or present a factual record. The notion that the plan is fair and equitable is belied by the terms of the deal with AmeriHealth. The transaction would leave Chartered with no ability to conduct business or satisfy its lease obligations to DCHSI, with liabilities to providers, and perhaps with whatever furniture or supplies AmeriHealth, in its sole discretion, may decide to leave behind. 1-AA-13-36. DCHSI would be left owning a shell company that holds liabilities, a lease with no ability to collect rent from Chartered and the right to attempt to collect amounts owed by the District after the relevant records have been transferred to AmeriHealth and after the contract also is transferred, such that DHCF will have even less incentive to pay Chartered. 1-AA-59-60.

The Rehabilitator claims that the agreement was "negotiated in good faith and at arm's length by professionals and advisors who vigorously advocated the interests of their respective clients," failing to mention that it was negotiated by people with substantial conflicts and that no one represented the interests of DCHSI as Chartered's sole shareholder and a creditor. 1-AA-58.

III. A STAY IS WARRANTED AND NECESSARY TO PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE INJURY

A. DCHSI will suffer injury without a stay

Absent a stay, the Rehabilitator will destroy Chartered's business, and thus destroy DCHSI. The harm here is not merely economic loss that can be cured; DCHSI's very existence is at stake. *Group Ins. Admin.*, 633 A.2d at 23. A stay is necessary to maintain the status quo pending this appeal.

The trial court concluded that DCHSI would not be harmed without a stay because Chartered is likely to receive $5 million from the AmeriHealth asset transfer. 3-AA-918. That sum, however, may never be paid, may never reach DCHSI and in any event is woefully inadequate to compensate DCHSI for the loss of Chartered. The trial court also reasoned that Chartered was retaining two assets: its $62 million claim against the District and $14 million in

assets securing a loan from DCHSI to Chartered. *Id.* But these "assets" are not new and do not enable Chartered, and thus DCHSI, to continue in business.

Further, the Rehabilitator's plan severely diminishes the value of Chartered's two remaining assets. Allowing Chartered to pursue the recovery of money it is owed does not rehabilitate Chartered, it merely is part of liquidating it because Chartered will not have an ongoing business, only debts to creditors that are not being transferred to AmeriHealth. And the fact that the District's existing plan leaves Chartered without personnel, books and records, systems or any revenue source or revenue-generating assets weakens Chartered's ability to pursue its claims. The Rehabilitator would put Chartered in such a position that the District will have almost no incentive to pay Chartered the money it owes short of a final judgment, because the District will not have a continuing relationship with Chartered. (Indeed, if the plan to liquidate Chartered is allowed to proceed, the claim against the District should be controlled by DCHSI, not the Rehabilitator, to remove the conflict inherent in the District effectively controlling the claim against itself.) Regardless of Chartered's recovery of money it is owed, it will have been liquidated and DCHSI's business in turn will have been destroyed.

The $14 million loan "asset" fares no better in establishing that Chartered is not being liquidated. This $14 million is pledged to secure a loan that DCHSI obtained to satisfy a debt Chartered incurred (i.e., a settlement agreement Chartered entered with the D.C. Attorney General in 2008, yet the Rehabilitator nevertheless appears to believe DCHSI owes that money to Chartered). But Chartered cannot "use" that money to pursue the District because it is security for a loan, and DCHSI also is being stripped of its only revenue sources (dividends and rental income from Chartered). Again, allowing Chartered to keep this "asset" does nothing to allow Chartered to remain a going concern.

The trial court also reasoned that DCHSI was not harmed because Chartered was "unqualified" to win the contract. The DHCF's supposed Chartered-specific bidding requirements, however, were unfounded. Moreover, even if one accepted those requirements, the Rehabilitator should have submitted the bid Chartered had been preparing for months, which would have afforded him an additional period of months to satisfy those conditions. Instead, the Rehabilitator eliminated Chartered's value by taking it out of the running before the race began. Chartered's future hinges on this appeal; allowing the Rehabilitator to continue to dismantle Chartered while this appeal is pending is unfair and unnecessary.

The trial court further noted that DCHSI's financial problems are of its own making and are "a product of the mismanagement of Chartered." 3-AA-918. There is no evidence to support this "finding," and the only evidence is to the contrary; what harmed Chartered's finances was the District's imposition of tens of millions of dollars in expenses that it has refused to pay.

Finally, in a footnote, the trial court noted the "strong public interest" in providing Medicaid coverage to Chartered's current enrollees and the potential harm to the Rehabilitator's AmeriHealth deal for Chartered. 3-AA-918. In fact, a stay will not harm Chartered's enrollees, employees or providers, who, respectively, would continue to receive care, be employed and be paid for services rendered.[6] As for the AmeriHealth deal, the Rehabilitator has made no showing that it is a good bargain for Chartered or its creditors and parties in interest. The court required nothing more than representations from the Rehabilitator, rendering the requirements of the

[6] Chartered's most recent financial statements (as of September 30, 2012) show that Chartered earned pre-tax operating profits of $6.7 million in the first nine months of 2012. 3-AA-766. Chartered's pre-tax net income was $728,224 because of an unexplained one-time write-off of $6 million, *id.* ("premium balances charged off"), but that does not change the fact that Chartered now is profitable. Chartered is earning approximately $33.4 million in monthly revenues and has $10 million in cash or cash equivalents on hand. *Id.* at 765-66. Thus, Chartered would be able to meet its financial obligations to providers and enrollees.

Rehabilitation Order and Rehabilitation Act a nullity. The sole evidence on the record is to the contrary, and the transaction accordingly should be stayed pending this Court's review.

Under any possible scenario, enrollees will continue to receive healthcare and providers will be paid. If a stay issues, the status quo—under which enrollees are receiving care and providers are being paid—will be maintained. Chartered's financial status demonstrates that Chartered can continue to perform. Absent relief, Chartered's employees will lose their jobs if AmeriHealth is not awarded the contract; a stay may avoid that result, and the consequences if there is no stay are entirely attributable to the Rehabilitator's ill-advised gamble. A stay is the only way to maintain the status quo, protect the interests of enrollees, providers and Chartered's employees and ensure that Chartered is not dismembered but instead has an actual opportunity to be "reformed and revitalized" or to realize fair value in a fair sale.

B. DCHSI can demonstrate a likelihood of success

Denial of Due Process. DCHSI was denied due process. The Rehabilitator filed his second status report and simultaneously also petitioned for expedited approval of the proposed asset transfer to AmeriHealth. 1-AA-55-227. That same day, DCHSI requested the opportunity to object to the proposed plan, pointing out that the Rehabilitator had withheld the details of the plan until filing his petition to approve it on an expedited basis. 1-AA-228-29. The Rehabilitator argued that DCHSI lacked standing to appear, and although he acknowledged that "some inconvenience to DCHSI is inevitable" (1-AA-233), there was an urgent need for a quick ruling. Then, at what was supposed to have been a status conference to set a briefing schedule, the trial court entered judgment on the merits. *E.g.*, 1-AA-246 (court goes directly to the merits), 251 (Court: "Well, you better give me something right now because you may not have an opportunity to brief this."). Yet the Court's order calls the hearing a "status conference" (1-AA-295) and never even notes that DCHSI appeared and attempted to object and seek briefing, let alone that

creditors were not given notice or permitted the opportunity to appear. DCHSI was never afforded due process to contest the Rehabilitator's proposed plan.

Improper Liquidation. Setting aside how the District ruined Chartered's finances and forced it into rehabilitation, the purpose of Chartered's rehabilitation proceeding was to devise a way to rehabilitate Chartered by restoring its capital reserves, not to destroy it. A rehabilitator's "primary duty" is "to conserve and restore the company to viable status." *Kueckelhan v. Fed. Old Line Ins. Co. (Mutual)*, 444 P.2d 667, 674 (Wash. 1968)). The Rehabilitator was first obligated to attempt a rehabilitation—"to reform and revitalize Chartered"—before deciding to liquidate it. 1-AA-9-10; D.C. Code § 31-1312(c); *Consedine v. Penn Treaty Network Am. Ins. Co.*, 2012 WL 6721078, *63, 68 (Pa. Commw. Ct. May 3, 2012). Nonetheless, the Rehabilitator jumped directly to liquidation (without court approval). 3-AA-749, 753-54.

The Rehabilitator's argument that his control (and sale) of Chartered was merely a "transformation," not a "liquidation" (3-AA-750-51) is irrelevant, because the Rehabilitation Act also plainly requires prior court approval for any "transformation" of an insurer. *See* D.C. Code § 31-1312(e) (if "rehabilitator determines that reorganization ... or other **transformation** of the insurer is appropriate," then he "shall prepare a plan," apply for its approval and, "after any notice and hearings the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified"; such plan must be "fair and equitable to all parties concerned"). The Rehabilitator himself described his plan as a "wind down" of Chartered's assets. 1-AA-62. Chartered's entire business was to service the DHCF Contract; thus, when the Rehabilitator decided to "no-bid" the contract, he effectively put Chartered, and thus DCHSI, out of business. 3-AA-750-51. Rather than accept that position, the trial court reasoned that the decision not to bid was not a "transformation" of Chartered, but merely an

exercise of managing Chartered's business. 3-AA-916. But this is merely wordplay: because Chartered's only business was the contract, abandoning the contract did not "transform" the company, but killed it.

Stripping Chartered of all continued operations and leaving it with nothing more than two non-operating assets is at the very least a "partial liquidation." Note also that in cases like *In re Rehabilitation of Am. Investors Assur. Co.*, 521 P.2d 560, 561 (Utah 1974), cited by the Rehabilitator (3-AA-685), the new company assumed "all of the assets and liabilities" of the old one. Here, however, AmeriHealth is not assuming all assets and liabilities of Chartered, and instead, the Rehabilitator is dissecting Chartered's assets—a hallmark of liquidation.

In short, the record is strong that the Rehabilitator has not followed the Rehabilitation Act's requirements and has converted a rehabilitation into a liquidation. The Rehabilitator ignored his legal obligation to seek prior court approval to liquidate Chartered.

IV. CONCLUSION

DCHSI will suffer irreparable harm without a stay pending appeal. The harm to DCHSI without a stay exceeds any harm to other parties, and DCHSI will expedite its appeal to minimize any harm from the stay. DCHSI's appeal presents serious legal questions and has the requisite likelihood of success for a stay.

April 29, 2013

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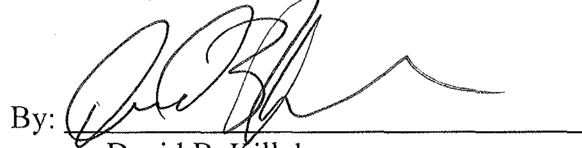

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