SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,
Department of Insurance, Securities and Banking,

Petitioner,

v.

D.C. CHARTERED HEALTH PLAN, INC.,

Respondent.

Civil Action No.: 2012 CA 008227 2
Judge: Melvin R. Wright
Calendar: 15
Next Event: Status Hearing
May 30, 2013, at 9:30 a.m.

THE REHABILITATOR'S MEMORANDUM IN OPPOSITION TO MEDSTAR'S MOTION TO INTERVENE

The District of Columbia and William P. White, Commissioner of the District of Columbia Department of Insurance, Securities and Banking ("Rehabilitator"), by and through their attorneys, the Office of the Attorney General of the District of Columbia, with Daniel L. Watkins, as Special Deputy to the Rehabilitator for D.C. Chartered Health Plan, Inc. ("Chartered"), oppose the Motion of Washington Hospital Center Corporation and MedStar Georgetown Medical Center (together "MedStar") to Intervene As Interested Parties ("Motion" or "Motion to Intervene") in this action.

MedStar's untimely intervention should be denied because MedStar has failed to demonstrate that it satisfied the elements for intervention under Superior Court Rule of Civil Procedure 24(a): its motion is untimely, its interests would not be impaired if the Court denies this motion, and its interests as a Class 3 creditor already are adequately represented by the Rehabilitator. Nearly half a year after this Court ordered Chartered to enter rehabilitation, MedStar seeks to intervene and substitute the Rehabilitator's discretion with its own judgment.

MedStar's untimely intervention would interfere with, delay, and impede Chartered's Rehabilitation, creating inefficiency and subjecting the Rehabilitator, and this Court's supervision of the matter, to unwarranted delays and expenses. Further, MedStar's proposed intervention is unnecessary. Denial of this motion would not impair MedStar's interests because MedStar's and other creditors' recoveries will be subject to this Court's review and approval. Finally, any interest MedStar claims as a creditor of Chartered is adequately protected and represented by the Rehabilitator, who has the authority and statutory duty to protect the interests of creditors, enrollees, and the public, in administering Chartered's Rehabilitation under this Court's supervision. For all of these reasons, the Court should deny MedStar's Motion to Intervene.

MedStar's Untimely Intervention Motion Should be Denied Because Its Interests as a Creditor are Not Impaired and are Adequately Represented by the Rehabilitator

MedStar's proposed intervention as of right would run counter to the applicable rule that permits intervention:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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.

SCR-Civil 24(a)(2) (emphasis added). Courts applying this rule have examined four factors: timeliness, interest, impairment of interest, and adequacy of representation. *See, e.g.*, *HSBC Bank USA, NA v. Mendoza*, 11 A.3d 229 (D.C. 2010) (citing *Jones v. Fondufe*, 908 A.2d 1161, 1162-63 (D.C. 2006)).[1] MedStar's motion fails this four-factor test. MedStar's interests as a

[1] The facts supporting intervention in *HSBC Bank USA, NA v. Mendoza*, 11 A.3d 229 (D.C. 2010) are distinguishable from those presented by MedStar. In that case, unlike here, the proposed intervenor was a mortgage company that had executed a deed of trust and held a security interest in, and an equitable lien against, certain real

provider-creditor, along with the interests of other creditors, are not impaired; indeed, they are protected and adequately represented in this case by the Rehabilitator and the Court's oversight of his actions. Moreover, allowing MedStar to intervene now—nearly six months after this Court ordered Chartered into rehabilitation and well after the Court's approval of the Asset Purchase Agreement—unquestionably would interfere with and impede Chartered's orderly rehabilitation. Intervention has been denied in other jurisdictions under similar circumstances (*i.e.*, where a creditor has sought to intervene in the administration of a receivership, liquidation, or rehabilitation).[2] Therefore, MedStar's motion should be denied.

MedStar's Motion is Untimely

MedStar's motion to intervene comes nearly six months after this Court ordered Chartered to enter Rehabilitation and, under this Court's supervision, implement a plan to "reform and revitalize" Chartered. Emergency Consent Order of Rehabilitation p. 2, Oct. 19, 2012 ("Rehabilitation Order"). It also comes well over a month after MedStar's first attempt to file a Notice of Appearance. *See* Motion ¶ 8. Under Superior Court rules, an application for intervention must be denied if it is untimely, and this decision lies within the court's discretion. SCR-Civil 24(a); *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 15 (D.C. 1981) (affirming the denial of the motion to intervene).

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property and was seeking to intervene to protect its interests in another's suit to compel a sale of the subject property and a related foreclosure proceeding. MedStar's stated interest is that of a Class 3 creditor of Chartered.

[2] *See, e.g.*, *Centrue Bank v. Gold Disc. of St. Louis, Inc.*, 4:10CV16 TIA, 2010 WL 1423101 (E.D. Mo. Apr. 9, 2010) (denying intervention-as-of-right for lack of a protectable interest where creditor merely sought to protect an unsecured claim); *F.T.C. v. First Capital Consumer Membership Servs., Inc.*, 206 F.R.D. 358, 364 (W.D.N.Y. 2001) (denying intervention-as-of-right because FTC adequately represented creditor's interests and permissive intervention not warranted); *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 467 (S.D.N.Y. 2000) (collecting cases showing that a majority of courts deny intervention-as-of-right under "analogous circumstances").

This matter has advanced well beyond the stage when MedStar's intervention may have been appropriate. The Rehabilitator's efforts have culminated in a Court-approved Asset Purchase Agreement ("APA") that, *inter alia*, sells certain of Chartered's assets to AmeriHealth District of Columbia, Inc. *See* Order Approving APA p. 2. Now, nearly six months after the Court entered the Rehabilitation Order, and over a month after the APA was approved by this Court, MedStar seeks to tie the Rehabilitator's hands by having the Court order the Rehabilitator to set aside an unspecified amount of "adequate reserves." *See* Supplement to Mot. to Intervene Ex. 1, Mem. in Supp. of Mot. for More Definite Statement p. 20 ("Supp. Mem.").[3] Ostensibly, MedStar seeks this remedy "to ensure the equitable treatment of creditors in the same class," but MedStar is in fact seeking preferred creditor status[4] and would have any and all its claims (including disputed claims) paid ahead of other creditors. *See* Supp. Mem. pp. 19-20.

MedStar previously sought and was denied similar injunctive relief (enjoining Chartered's assets) in D.C. Superior Court by Judge Epstein. Ex. 1 pp. 17, 18, 44, 45, Transcript of Oral Ruling, *Wash. Hosp. Ctr., et al. v. D.C. Chartered Health Plan*, No. 2012-CA-009510 (D.C. Super. Ct. Jan. 16, 2013). The Court denied MedStar's motion for a temporary restraining order seeking to enjoin and impose a constructive trust upon Chartered's liquid assets because the Court concluded that MedStar had failed to demonstrate any of the four requirements necessary to obtain injunctive relief in the District of Columbia. *Id.* After its motion seeking

[3] MedStar's Motion refers to a Motion for More Definite Statement Regarding Rehabilitator's Plan of Reorganization and its supporting memorandum, which have been attached as Exhibit 1 to MedStar's Supplement to Motion to Intervene (accepted for filing Apr. 17, 2013). MedStar's Motion for More Definite Statement is without merit: it does not articulate a claim under Rule 24(c), and it is styled as a motion typically reserved for parties that may respond to pleadings. Moreover, none of the Rehabilitator's filings are "so vague or ambiguous" as to merit granting the motion under Rule 12(e).

[4] MedStar incorrectly claims it is a Class 1(B) creditor, which would give it priority over Class 3 creditors. Class 1(b) creditors whose authorized services were rendered in the rehabilitation are entitled to priority distribution of claims. *See* D.C. Official Code § 31-1340(1)(b); Pet. for Order Approving APA p. 8, Feb. 22, 2013, *approved*, Mar. 1, 2013. Under the Plan of Reorganization, provider-creditors are considered Class 3 creditors if they are obligated to hold enrollees harmless from liability for services covered by Chartered. *See* Pet. at 8.

emergency injunctive relief was denied by the Court in January, MedStar did not move for preliminary or other injunctive relief. MedStar then delayed several more months before seeking to intervene here and attempt to obtain similar injunctive relief in this action. Accordingly, this Court should exercise its discretion and deny MedStar's motion as untimely.

MedStar's Interests as a Creditor Are Not Impaired by this Action

In its motion, MedStar alleges only that it is "a party affected by" Chartered's Plan of Reorganization and that it "has an interest to protect." Mot. to Intervene ¶¶ 5, 12. In its accompanying Memorandum for More Definite Statement, MedStar further claims that "the risk to MedStar that it may not receive payment for its claims on par within [sic] other creditors within its classes . . . [forces MedStar] to conclude that the Rehabilitator may be taking positions regarding MedStar's creditor status and claims within the Plan that are improper." Supp. Mem. p. 18. Notably, MedStar offers no support for its speculation concerning the Rehabilitator's "taking positions . . . that are improper." And there is none in fact.

MedStar's interest as a creditor of Chartered has not been impaired, and MedStar has not even attempted to demonstrate otherwise in its motion.[5] This Court granted the Rehabilitator and his Special Deputy the "[a]uthority to take possession and control of Chartered's assets and administer them under the general supervision of the Court," and the "[a]uthority to take such action as deemed necessary or appropriate to reform and revitalize Chartered." Rehabilitation Order p. 2. In exercising such authority, the Rehabilitator is statutorily bound to protect the interests of Chartered's creditors, as well as those of Chartered, its enrollees and the public. *See, e.g.*, Insurers Rehabilitation and Liquidation Act of 1993, D.C. Official Code §§ 31-1310(1),

[5] The sections of the D.C. Official Code cited by MedStar to support its intervention motion, D.C. Official Code § 31-1301 and §1312(e), do not address or support intervention by creditors into a rehabilitation. Section 1301 simply outlines various definitions while Section 1312(e) merely provides that "[a]ny plan approved under this section shall be, in the judgment of the court, fair and equitable to all parties concerned."

31-1313, 31-1314. In exercising his duties, this Court recently found, "the Rehabilitator has 'full power to direct and manage . . . and to deal with the property and business of the insurer.'" Order p. 3, Apr. 2, 2013 (alteration in original) (quoting D.C. Official Code § 31-1312(c)).

Allowing creditors to second-guess the Rehabilitator's decisions would interfere with and impede the Rehabilitation. The statute provides an efficient mechanism for the Rehabilitator to seek input from creditors if he and the Court determine such input is necessary and appropriate.[6] Under D.C. Official Code § 31-1312(a), the Rehabilitator may, with the Court's approval, "appoint an advisory committee of policyholders, claimants, or other creditors . . . should that committee be deemed necessary." There is no section in the Insurers Rehabilitation and Liquidation Act, however, that provides for the sort of individualized intervention and additional creditor oversight that MedStar seeks.

Nor are MedStar's statutory remedies (*see* D.C. Official Code § 28-3107) as a creditor at risk of being impaired.[7] As it did before Judge Epstein in *Wash. Hosp. Ctr., et al. v. D.C. Chartered Health Plan*, No. 2012-CA-009510 (D.C. Super. Ct.), MedStar improperly seeks through intervention to obtain preferential treatment from the Rehabilitator and this Court to advance its disputed provider claims, which are currently the subject of a pending arbitration.

MedStar improperly and mistakenly seeks to position its interests above those of other creditors, claiming Class 1(B) creditor status, which is reserved exclusively for the costs and expenses of administration of the rehabilitation itself, and asking this Court to bar creditors'

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[6] It should be noted that, in addition to being a creditor as a medical provider, MedStar also competes with Chartered as one of the District's three Managed Care Organization contractors serving Medicaid enrollees.

[7] MedStar also points to DCHSI's attempt to interfere with this Rehabilitation as supposed support for its motion to intervene. Mot. to Intervene ¶ 7. Despite the fact that DCHSI is Chartered's parent company, and not merely a creditor, this Court recently denied DCHSI's motion to stay, finding among other reasons that DCHSI "would retain the rights to make" claims. Order p. 5, Apr. 2, 2013. MedStar's claims and creditor's remedies against Chartered would similarly be preserved through the Reorganization Plan.

claims within ten days of the order they propose. *See* Supp. Mem. pp. 2, 19. The Rehabilitator is duty-bound under the Reorganization Plan to treat MedStar the same as all other Class 3 provider-creditors—no better and no worse. An individual creditor such as MedStar should not be permitted to use intervention to seek preferential treatment especially when they and the Rehabilitator are expending considerable time and resources pursuing resolution of disputed matters through an agreed arbitration.

Despite seeking such preferential treatment, MedStar claims that all creditors "are parties in interest in the rehabilitation proceedings." Supp. Mem. p. 2.[8] If MedStar is permitted to intervene as of right then any and all other creditors could also seek to intervene and second-guess the decisions of the Rehabilitator and the Court's oversight. The Court should not open the door to such interference.

MedStar's interest in intervening in this action must be weighed against the impact of such intervention on judicial efficiency and the orderly Rehabilitation of Chartered. *See Jones v. Fondufe*, 908 A.2d 1161, 1163 (D.C. 2006) (citing *Calvin-Humphrey v. Dist. of Columbia*, 340 A.2d 795 (D.C. 1975)) (weighing a party's interest against questions of efficiency and due process). Specifically, MedStar seeks to intervene to have this Court: (a) order the Rehabilitator to create, distribute and update detailed information regarding all of Chartered's creditors, its assets and payments, (b) order all other creditors to file expedited proofs of claims, (c) order the Rehabilitator to engage in monthly reporting requirements beyond those ordered by the Court, and (d) order the Rehabilitator to "maintain adequate reserves to ensure that all creditors are

[8] Although MedStar relies upon a statement in one of the Rehabilitator's sur-reply briefs on DCHSI's motion to stay, that statement ("interested parties not before the Court," including "Chartered's enrollees, employees, providers and other D.C. residents") was addressing parties who would have been interested in the outcome of certain injunctive relief sought by DCHSI. That statement did not imply that all of "Chartered's enrollees, employees, providers and other D.C. residents" should be permitted to intervene in this action as of right as MedStar now contends.

paid." *See* Supp. Mem. pp.19-20. It is readily apparent that MedStar's attempted intervention at this stage would disrupt and delay the Rehabilitator's efforts to administer an efficient and expeditious rehabilitation, which include plans for an orderly and timely claim submission and determination process as well as detailed reports to the Court regarding claim liabilities and assets available. And, as the Rehabilitator's reports to the Court have repeatedly emphasized, almost all of Chartered's assets are currently illiquid. Claims regarding those assets are being diligently pursued. There are not sufficient liquid assets to reserve to ensure that all creditors are paid. Amounts ultimately available to pay creditors will depend on realizing value from Chartered's illiquid assets.

The Rehabilitator Adequately Represents MedStar's Interest

The Rehabilitator more than adequately represents the interests of creditors in this action, including MedStar. If the interest of a proposed intervenor is adequately represented by an existing party, then intervention must be denied. *See Calvin-Humphrey v. Dist. of Columbia*, 340 A.2d 795, 800 (D.C. 1975); SCR-Civil 24(a). Moreover, where, as here, the Rehabilitator is a party, the Court must presume an interest is adequately represented by government officials, especially when the matter concerns a question of "policy vested to the discretion of the city government." *See Dist. of Columbia v. Greater Wash. Ctr. Labor Council*, AFL-CIO, 442 A.2d 110, 120 (D.C. 1982) (citing *Calvin-Humphrey*, 340 A.2d at 800). And of course, this Court itself is obligated to oversee and approve the Rehabilitator's plan to ensure that it is "fair and equitable to all parties concerned." D.C. Official Code § 31-1312(e). As a result, MedStar's intervention is unnecessary: because the Rehabilitator is a government official, he is presumed to protect the proposed intervenor's interests, and MedStar has made no showing to demonstrate otherwise.

In addition, MedStar acknowledges that its interest in this action is aligned with the Rehabilitator's charge: to ensure that the Reorganization Plan is "fair and equitable to all parties concerned." *See* Supp. Mem. p. 16 (citing D.C. Official Code § 31-1312(e)). As such, MedStar's intervention is unwarranted and should be denied because the Rehabilitator (and the Court) are pursuing MedStar's stated objective by ensuring that the Plan as adopted will be "fair and equitable to all parties concerned." *See Vale Props., Ltd., v. Canterbury Tales, Inc.*, 431 A.2d 11, 15 (D.C. 1981) ("A presumption of adequate representation will arise . . . when an existing party seeks the same ultimate objective as the applicant"; and "'[A] slight difference in interests between the applicant and the supposed representative' will not suffice to show inadequacy of representation.") (citations omitted)).[9]

* * * *

[9] Although MedStar has not requested it, if MedStar's motion to intervene as-of-right is denied, the Court should also prevent MedStar's permissive intervention. The Court may exercise its discretion in determining whether it should grant permissive intervention. SCR-Civil 24(b). For the reasons demonstrated above, this Court should exercise its discretion and deny any attempt by MedStar to intervene.

Conclusion

MedStar's motion has not satisfied and cannot satisfy the requirements for intervention under Rule 24(a) for the reasons stated above. The Court therefore should deny MedStar's Motion to Intervene.

Date: April 22, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, a copy of the foregoing was filed and served by email upon:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

.....x

WASHINGTON HOSPITAL

CENTER CORPORATION, ET. AL.,

PLAINTIFF,

VS. 2012-CA-9510B

DC CHARTER HEALTH INC.,

DEFENDANT. Wednesday, January 16th, 2013

.....x

The above-entitled matter resumed for a trial before the Honorable Epstein in Courtroom 47A, commencing at approximately 9:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL COURT REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

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On behalf of the Defendant:

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P R O C E E D I N G S

(Whereupon, all parties are present, and hearing convened 9:30 a.m.)

THE DEPUTY CLERK: Your Honor, calling the case Washington Hospital Center Corporation versus DC Charter Health Inc., civil action number 9510-2012.

Will the parties identify yourselves for the record?

MR. BOLDEN: Your Honor, on behalf of DC Charter Health Plan the Defendant, A. Scott Bolden, good morning.

MR. WAXMAN: Good morning, Your Honor, Mark Waxman on behalf of the Plaintiffs.

MR. BOLDEN: Your Honor, if I may also with me is Larry Sher who is a colleague of mine at Reed Smith and Carlos Valdivia, also a colleague.

MR. EDMONDSON: Your Honor, I'm Joseph Edmondson, I'm with the Foley and Lardner DC Office, and this is Lee Bergman, Corporate Counsel, for Med Star Health Corporation.

THE COURT: Well, I appreciate you're coming here across the street. I spoke with Judge Mencher yesterday evening and he thought, and I completely agree, it really makes more sense for me to address the TRO because the case is on my calendar.

I've read the application for the TRO, the

opposition and the partial motion to dismiss. I've looked briefly at what we call Med Star's reply. I then looked -- I haven't had a chance to look at, carefully, at the motion for expedited discovery and the reply. I will.

I don't think there's going to be any objection to grant the motion for leave to file a brief well under the page limit. So, that's done.

Let me -- I mean I understand the four-prong test, but I want to start not talking about the merits but about the relief that Med Star's requesting. And these are going to be questions at least initially mostly for Mr. Waxman, Mr. Edmondson, whoever wants to answer.

As I understand it, I mean the driving force behind the TRO request is that Med Star, as it puts it, does not want to be relegated to the status of a general creditor. One of the things I don't understand is how the relief you're asking for the TRO would change that, if I impose a constructive trust, and I need to understand Charter's arguments on that score. If they become insolvent and enter bankruptcy you're still going to be a general creditor. It isn't going to effect -- you're not going to have any higher priority in any bankruptcy proceeding. I just don't understand how the relief you're requesting solves the problem you say you're facing.

MR. WAXMAN: I think there's a couple things going

on here to address. Now, the first is we provided services for their beneficiaries and we continue to do so on an ongoing basis.

THE COURT: Well, okay, then I guess I'm a little -- because I thought on December 4th you terminated the contract.

MR. WAXMAN: We did. And for the ninety-day period following the termination of the contract we're required to continue to provide under a continuation of care obligation with respect to those who are in our hospitals and those who are undergoing and ongoing treatments by our physicians for a defined period of time. So, we have claims that would be due for a period pre-filing or pre-termination depending on what we see the appropriate benchmark, which are being submitted and which should be paid and claims which will be submitted for services we are rendering and should also be paid.

So, the concern what we have is claims that will be paid in the ordinary course during any particular time period up through and including today, tomorrow and the next day. As a result of the recoupment what's happening is that those claims will be paid and the rehabilitator says his job and their job is to continue to pay claims in the ordinary course. What's happening as a result of the recoupment is as they process the claims they are taking

the money.

THE COURT: But you're not asking me to order Charter to pay your claims as you say they become due. You're asking me to impose a constructive trust. And my question was how does that effect your status as a general creditor which you say is one of the primary harms you want to avoid?

MR. WAXMAN: Because there's two reasons. One is they're required -- whether you order it or not, you don't have to order them to continue to pay our claims every thirty days from the date they're submitted, that's what's required under the DC law. The issue is whether there's any money to do that. And through the recoupments what they're doing is taking the money that they would be paying us, we wouldn't need to be a general creditor because they would be paying our claims on an ongoing basis under DC law, but for this recoupment theory that says, well, we're not going to pay your claims on a thirty-day basis, we're going to just take the money and use it for other things. Like building up the sale value or whatever else they're going to do with it.

But what we recognize is if there is a bankruptcy filed, and we think that may be imminent, we're entitled to get paid our claims for services being rendered on an ongoing basis.

THE COURT: Whether I grant the application or not, in a bankruptcy proceeding you'll be a general creditor, a general unsecured creditor, correct?

MR. WAXMAN: Yes. But until they file, we don't know if they're filing today, tomorrow or the next, but until they file, as a result of these recoupments they're not paying us what they owe us in the ordinary course to avoid our being a general creditor at all.

So, in a sense they're creating a preference for themselves and somebody else as opposed to paying our claims for the services we're rendering today.

THE COURT: Let me ask a different question about the relief. The order would effect, and I think I'm quoting from the proposed order, funds that are dedicated or properly should be dedicated to payment of Med Star claims.

MR. WAXMAN: Right.

THE COURT: If I'm the CFO of Charter, what am I supposed to do? What -- what money, what cash in which account am I required under this order not to touch unless Charter comes to me and asks me for permission?

MR. WAXMAN: I guess I'm not sure by the last part about what you said. I think what you're saying is if we say you have money -- we don't know all of their accounts. But you're saying you have money to pay claims on an

ordinary basis, we want to you keep paying claims and have the money available to do that which is what you said you would do.

THE COURT: I'm reading the third ordering clause on your proposed TRO. A constructive trust shall be imposed on all funds that Defendant funds are dedicated or properly should be dedicated to the payment of Med Star's pending claims for the payment of claims or issues in dispute, until the conclusion of this action, such that the Defendant shall not dispose of any such funds without first seeking permission from this Court by motion with notice to Plaintiffs.

So, what I understand it you're asking me to freeze some accounts and that basically -- and I'm asking, well, I don't know what accounts you're asking me to freeze and I'm not going to issue an order unless it gives the Defendant reasonable notice of what accounts are being frozen.

And just to give you fair notice, my next question is going to be how am I supposed to decide whether to grant a request to release some of those funds and why should I be making that decision when the District of Columbia Government has afforded a receiver or rehabilitator to do that?

But my first question is what -- what funds are

you asking me to freeze? And it's not just the funds that are dedicated, but properly should be dedicated to payment. I just -- I think I have a responsible responsibility if I'm going to issue a TRO to make it clear so that the Defendant knows exactly what it's supposed to do and how it's supposed to do it.

Now, I don't understand what the practical effect of the TRO you requested would be.

MR. WAXMAN: I think the practical effect would be for those funds which they're holding for the ongoing payment of claims.

THE COURT: But we don't -- let me -- have you presented any evidence that there's some funds that are dedicated to the payment of ongoing claims, that there's some account that Charter has established? I mean I'm not -- I am not now and never have been a MediCaid lawyer, I don't know how that's done. But from what I do know, I would be surprised, you know, if they're separate accounts, but I don't know.

But what I do know is I haven't seen, I don't think unless I've missed it, any evidence from Med Star that there is some account that is dedicated. Again, your proposed order says not only that it is dedicated, but properly should be dedicated.

So, I mean to me if I were the CFO and I was

concerned about not being held in contempt of the TRO I would basically say I'm going to freeze all of the bank accounts. I don't know if I can pay salaries as they become due. I don't know how -- I don't -- what can be -- what other bills can be paid and what bills can't be paid without coming in?

MR. WAXMAN: We don't have the name of the particular account to which they're funding the ongoing payment of claims. We need some discovery in order to get a specific account. But the rehabilitator has said in his report and even Mr. Christian in his that they are ostensibly funding the ongoing payment of claims out of funds that they have available for that purpose.

THE COURT: Okay. So --

MR. WAXMAN: Absent the --

THE COURT: -- we've identified that account and Charter comes to me and says funds that either have been or properly should be dedicated and Charter says, well, we've got you want money from us on an ongoing basis, we have other suppliers that want to be paid, we have employees that want to be paid, we have payroll taxes that need to be paid, we have real estate taxes that need to be paid, we want to you to author -- and I'm supposed to then decide, okay, I think that use of the cash you have on hand is a higher and better use than holding it in reserve in case

you end up winning on this case or there's some pot of money that you'll be a general creditor with a claim for if Charter goes into bankruptcy.

MR. WAXMAN: So, let me understand the challenge, and it feels like the right response is we need to go determine the precise accounts to do that, that's number one.

Number two is in another sense they owe all of the claims in thirty days. So, to the extent that there's a choice to be made, the DC Government's already made that choice they say we want you to pay those claims in thirty days.

THE COURT: Does Charter also have claims -- I assume there are doctors who provide services to these a hundred and ten thousand MediCaid enrollees who are not hospitalized. So, I mean there are other doctors and health care providers who are knocking on Charter's door and saying we want to get paid.

MR. WAXMAN: Sure.

THE COURT: Do you -- is it your position that you get paid before them? They have a right to be paid in thirty days. How do I decide if I enter this TRO, and if you're right, that there's not enough money to pay anybody, and according to the report that the special deputies, the rehabilitator filed with Judge Wright, then there's the six

million dollars kind of capital and surpluses at the end of last year. I'm just trying to understand how it would work.

MR. WAXMAN: So, what I understand I think in order to define an account we need to go get more information. But what I think you can --

THE COURT: Okay. We define an account and so it's used not just to pay Med Star, it's used to pay doctors, it's used to pay clinics, it's used -- you know, how do I. --

MR. WAXMAN: So that --

THE COURT: Do you have any reason to believe that there's just one account that's dedicated to Med Star and that nobody else gets paid from it?

MR. WAXMAN: I have a reason to believe that there is an account from which they pay claims and that a portion of that --

THE COURT: Just by Med Star or claims for any providers?

MR. WAXMAN: That I don't know. But we want to go find out. But the part that to me is discreet is, and could be focused on, is the amount of money they recouped from us in payments they were going to pay us, that amount of money should be set aside, either put in a trust and they ought to be told go forward, don't do it. That's

money they took from us. That money is discreet, they know what they took from us. You could impose a trust on that.

THE COURT: The amount of the money is discreet.

MR. WAXMAN: Uh?

THE COURT: The amount of money can be calculated, it can be calculated now or it can be calculated, you know, after trial, if we have a trial.

MR. WAXMAN: If there's anything left after the point of the motion.

So, for purposes of your question if there is a very discreet amount of money that they took from us, they've indicated they know how much it is, it could be the subject of a trust to say, hey, you took that money from them, I'm not going to let you disburse it to all those other people, you are going to pay it. I'm not going to let you give it to other people for the services that they provided, I want you to hold the money until we can figure out, on the merits, whether you're entitled to take that money back or not.

THE COURT: Well, in regards to the next question I promised to ask you which is why should I be making those decisions instead of the rehabilitator or a special deputy? I mean they were appointed to basically make sure that Charter is operating responsibly, that its cash flow is managed properly. I mean if I'm deciding, you know, who

ought to -- what MediCaid providers ought to get paid and in what order, isn't that -- how do my responsibilities relate to the responsibilities of the rehabilitator? If the rehabilitator's doing his job properly, why do I need to do it?

MR. WAXMAN: So, the rehabilitator made an appearance in this case, filed a declaration and took no responsibility for the determination of this dispute, made no objections to --

THE COURT: Well, actually he did. He more or less -- he agreed at least with some of the positions that Charter has taken. I mean I will give you -- that the tone of his affidavit about the financial situation of Charter is a little bit more positive than the tone of the report that he filed before Judge Wright. All of the challenges that he discussed in the report to Judge Wright don't figure.

And I'm not -- I mean I can understand, let me put it this way, why Med Star is nervous about whether it's ultimately going to get paid. But my -- but I'm focused here on whether I ought to grant some emergency relief in part. I mean that's -- because I understand that Med Star is facing challenges that I'm concerned about entering an order that would -- I was going to say step on the toes of the rehabilitator, that's really not the point, but that

would make it more difficult for the rehabilitator to do his job.

And, indeed, if I enter an order that kind of makes other creditors nervous that could jeopardize the sale, which you argue and the rehabilitator seems to think is the one thing that could provide Charter with the capital and other resources it needs to remain viable, it's actually going to end up hurting you.

If I enter an order that makes the rehabilitator's job more easy -- I mean more difficult that, at least some level, hurts you.

MR. WAXMAN: So, the rehabilitator, A, had the ability to come in and stay this case entirely under the statutes that authorizes the rehabilitator's actions. The rehabilitator's could have gotten involved in the case, come in and said you know something, I don't want this case to go forward for all the reasons that you've just said, and chose not to do that.

So, the answer, one answer to your question which I think is kind of a direct answer is if the rehabilitator wanted to assert his authority or the rehabilitator wanted to say, you know, this is screwing up the works. The rehabilitator had the authority to come in here and do that, and chose not to.

But what the rehabilitator actually did was say

we've got two parties, go ahead and litigate it, I'll tell you some facts that might be helpful. But the rehabilitator didn't say either, A, this is going to prevent a sale, or B, I'm just staying the case which I have the authority under my statutes to do. The rehabilitator said go at it, essentially.

So, to your point if the rehabilitator really felt that this was going to gum up the works, the rehabilitator should have come in and have said so, but he didn't do it. What the rehabilitator did do, and I completely agree with sort of your characterization, is that the unbiased report said, you know, these guys are in serious trouble for a lot of reasons we can't get into, I don't know if they're going to make it, which the auditor's also said I don't know if they're going to make it.

So, I don't think the rehabilitator has made the decision, at least as of today, not to get involved and say if you guys --

THE COURT: Well, I'll start with the report, I'm looking at page eight paragraph eight on other matters, the rehabilitator has also authorized the defense of any litigation including this case for injunctive relief growing out of Charter contractual audit of claims paid by those two entities, to Med Star.

MR. WAXMAN: So, that is exactly what I'm saying.

The rehabilitator said go ahead, litigate the case. Didn't say stop, it's going to mess me up. Didn't say don't go litigate the case, it's going to interfere with the administration. It didn't say it's going to interfere with the sale.

I read that as saying I've authorized you to go get involved and litigate the case, and I take it exactly at face value. And --

THE COURT: Well, does it -- if I freeze some yet unknown account with some as of now unknown amount of money in it, isn't that bound to complicate the work of the rehabilitator?

MR. WAXMAN: A, I don't think so because at the end of the day that's our money. You're not adversely effecting other people.

Absent that --

THE COURT: But the whole argument that the financial difficulty is that Charter doesn't have enough money to pay everybody it owes. You say it's your money, you know, some physician would say, no, that's my money. The employees would say, no, that's my money. The DC tax assessor would say, no, that's my money. And, you know, unless they get -- I mean one way to read the report to Judge Wright is, you know, unless this sale is completed and there's a substantial infusion of cash, it's going to

implode and a lot of creditors aren't going to get paid a hundred cents on the dollar.

So, it's not your money -- it's not your money any is -- any more than it is the money of other general creditors who is the premise of your application recognizes stand equal before the law, at least before a Federal bankruptcy law.

MR. WAXMAN: Well, in one respect -- let me come back to -- one respect which has to do with the claims and services that we're providing today, and the claims and services we provided yesterday, which is given the unlimited power, absent the restraining order on recoupment, we're obligated to provide those services, and, ostensibly, get paid nothing based upon a discretionary act by the plan that says, oh, yeah, you provide the services anyway and we're not going to pay you because we're recouping. I don't think that that kind of thing is equitable to us as opposed to anybody else. And yet, they're saying, no, we have an unlimited right to recoup based on -- I'll just say charitably -- a disputed theory so you guys can keep rendering services to the members and the citizens of the District for nothing.

And the first part of our relief says we want you to follow the law and pay us in thirty days like the District of Columbia says you should and we don't think

pending resolution of this dispute you ought to be able to arbitrarily say, oh, no, we're offsetting whatever we might owe you for taking care of business today with some sort of recoupment theory, which is apparently what they're arguing. There is an unlimited power to recoup based on the fact that they owe us money and have created a theory to take it themselves.

THE COURT: Well, at one point in your papers you express a concern that Charter is dissipating assets. What evidence do you have that there's any dissipation of assets, notwithstanding the involvement of the rehabilitator?

MR. WAXMAN: Reading the rehabilitator's report, A, it sounds like nobody can figure out where any money is going because you can't --

THE COURT: Well, that's -- I understood that the dissipating would be an ongoing problem. The rehabilitator said there are problems figuring out where money has gone in the past. But I understood this to be that your concern is, which I will say seems inconsistent with the claim that the kind of overwriting part of Charter is to make its financial conditions look better than it really is and hold onto cash, minimize debts so that it will appear more attractive to potential buyers than, perhaps, it should. But I can't -- the TRO is supposed to prevent continuing

harm. What monies have been dissipated in the past, and that's obviously not an issue to me, I can't do anything about through a TRO.

My question is, you know, if there were some kind of -- if there was evidence, and I don't even think there is an obligation that, notwithstanding, the involvement of the rehabilitator, Charter is claiming invalid claims by physicians or whatever, and, you know, then maybe, and it's a big maybe, because I understand, you know, about kind of whether economic loss can be irreparable injury. But I -- let me just see if I can give you --

MR. WAXMAN: Well, I think if I may, the TRO is really focused on recoupment. The ongoing exposure we have as a result of recoupment you're not getting paid for services we're providing.

THE COURT: But you say on page twenty giving the very substantial likelihood that the Defendant will be liquidated in light of its insolvancy. Well, I think the best evidence of insolvancy today is the affidavit of the special deputy who says they can pay their bills today as they come due. It there maybe a dispute as to that. Med Star must be protected from the dissipation of assets that could render Defendant judgement proof which in turn would necessarily leave Med Star with no adequate remedy of law as a result of this litigation.

So, my question was what is the on -- is there any evidence of ongoing dissipation of funds, notwithstanding the involvement of the rehabilitator?

MR. WAXMAN: I think the biggest issue on the financial side, I think if I were to summarize it, was the thirty million dollar capital shortfall on the statutory required money. And the question and the nature of the fourteen million on the balance sheet as to whether that number is understated by another fourteen.

So, I think the biggest issue is, is there going to be anything left -- we don't know what's going on here day-to-day other than they appear to be incredibly short on funds in order to survive.

THE COURT: I also want to ask about the arbitration issue which I understand it only goes to, I think, the hospital services agreement.

MR. WAXMAN: One of them.

THE COURT: One of them with Washington Hospital Center, now with Georgetown.

All I had to a chance to do before the hearing is I just got it a couple minutes before we started was in your reply you said in your Federal cases that notwithstanding arbitration clause there is at least some room to grant injunctive relief.

MR. WAXMAN: The --

THE COURT: I mean, obviously, I haven't had a chance to look at those cases. I mean our -- have you -- have you started -- there's a process if you invoke the arbitration provision each side is thirty days with designated arbitrator then those two have fifteen days to pick a third.

Have you started that process?

MR. WAXMAN: We have not started the process. It's up to them if they want to start that process.

THE COURT: Well, why -- but you're the one who say you're getting stiffed. You have a dispute under the agreement. I mean they've raised this as a defense, failure to arbitrate. They're saying you've asserted a claim, you agree to take it to binding arbitration, and you haven't done that.

MR. WAXMAN: So, the case is --

THE COURT: So, the ball is in your court.

MR. WAXMAN: So, that cases are clear that while -- first of all, the ball isn't in our court, either party could waive that clause to litigate. They don't want -- it's their choice, not ours.

THE COURT: Well, we now know what their choice is, they've invoked the arbitration clause.

MR. WAXMAN: We agree. And our view is that's fine, but the cases are clear that while you're heading off

to arbitration there's still the ability to get injunctive relief to reserve that which you're arbitrating about.

THE COURT: But that's why I asked the question I did, because again I maybe preserve the status quo while you're heading off to arbitration, but you're saying you're not heading off to arbitration, if I enter a TRO --

MR. WAXMAN: Well, responding to that, we haven't responded to this demand which came in, we have to make a decision as to whether we're obligated to or not, but if you enter an order saying stop recouping so that they can continue to get paid for the services they're rendering, that's not going to preclude an arbitration, that just says whatever monies that are in dispute they got to preserve it. That's why --

THE COURT: I mean I looked at it briefly it's a short arbitration clause. Is there anything that would preclude the arbitrators from granting injunctive relief pending, you know, pending the final resolution of the arbitration.

MR. WAXMAN: I don't know if there's any arbitration clause about injunctive relief. But while we're determining whether both parties are going to arbitrate and who the arbitrators are we're rendering services every day for which we may not be paid. And so to preserve that while the arbitration issues get started is

well within the Court's jurisdiction, that's what the cases that we provided say.

So, you're not interfering with an arbitration, you're not making a final decision about an arbitration, you are saying I'm going to preserve the status quo, I'm not going to let you continue to take their money while you guys go work out that dispute.

THE COURT: But if I were to go that route, like I said I haven't had a chance to read any of the cases, it seems to me the most I could do is say I'm going to preserve the status quo until the arbitrators have been appointed and you can ask them for some relief pending a final resolution, and I set a deadline, you know, for you to start, you know, the arbitration process.

Because, otherwise, I will -- I mean I would be undermining -- I'm supposed to -- it seems to me my responsibility, even if I have jurisdiction in some sense to do something, would be to make my intervention as limited as possible so I don't interfere with the parties' agreement to have this all resolved through arbitration and not through litigation in a courtroom.

MR. WAXMAN: Well, your order would continuously be limited to what the arbitration clause apply to, not to the contract that it didn't.

THE COURT: I understand. Out of curiosity --

well, maybe it's a more than idle curiosity. I mean I didn't have a sense about what percentage of the claims involve Washington Hospital Center versus Georgetown, is it fifty/fifty, seventy-five/twenty-five? I'm just trying to get -- does -- I'll put it this way, how much of the dispute is going to be resolved through binding arbitration?

Or put it in these terms, of the twenty-eight million dollars that you say Charter owes how much is owed by Washington Hospital -- how much is owed to Washington Hospital Center and how much to Georgetown?

MR. WAXMAN: I think we've got the numbers, there's twenty-nine arbitrable and four and-a-half on the other side.

THE COURT: I'm sorry?

MR. WAXMAN: Twenty-nine million, plus/minus --

THE COURT: Okay.

MR. WAXMAN: -- would be if there were arbitration, subject to arbitration, and four and-a-half million would not, approximately.

THE COURT: So, over eighty percent of the money at issue is going to be resolved by the arbitrator?

MR. WAXMAN: Potentially.

So, to your point we'd have to get there at a decision -- the arbitrator has to say, yes, that's my

decision and I'm going to make it, which takes sixty days, ninety days. And again we'd like there -- even if we went that route, we still would like to get pay along the way for what we're doing today.

THE COURT: Oh, I understand that.

MR. WAXMAN: I'm not talking about the lawyers. I'm talking about the doctors.

MR. BOLDEN: I want everybody to get paid.

MR. WAXMAN: Mainly -- recognizing your comment, you still have to get -- you still have to get there.

THE COURT: Well, let me -- on my agenda so far, let me -- I mean I hope it's obvious that I've read the papers that both sides have submitted reasonably and carefully, I don't want you to repeat anything, and I'll give Mr. Bolden the same opportunity.

Is there any other, you know, arguments you want to make, points you want to emphasize?

MR. WAXMAN: I think there are two. And I appreciate the thoughtfulness of the questions because I mean this is not the easiest case in the world.

But one is if we look back at where we are today, it's entirely of Charter's making. We submit the claims, they decide what to pay. Knowing the issues, they decided to pay us what they did, and now have come along later and said knowing the issues and knowing that we paid you what

we did, and knowing whatever the dispute was, we paid X amount, that we've now come in and they've said after X period of time, oh, no, we now changed our mind and we're going to take that money back.

So, the whole notion that some how they're entitled to take advantage of their own wrongdoing has to weigh into the equities of this.

To which the other piece is when we look at the ability to recoup it isn't cited set, there is no authority to do it, and when we think about where the equities are, and I hate to go back to it but it is so important, we're the one providing services for their members. There is no inequity to them whatsoever and they didn't cite any. The rehabilitator, to Your Honor's question, didn't cite any, and it says stop recouping the money and pay these people on their claims.

So, if you look at where the equity is and who may be around to resolve the dispute at the end there's no equity on the Charter side whatsoever. And they're the ones who may not be around so they shouldn't benefit from the fact of whatever the issues they chose to overlook them and pay us the amount that we were due with full knowledge of all of the issues on the table.

And the question, well, why did they do that? Well, we're going to try to find out in discovery, but they

shouldn't be able to now benefit by having made those payments as they go off to try to sell themselves to somebody. When you think of where do we hit the equities and you think about, well, some cases are insolvancy are in one place, some may be in another. In my mind when I've read all of those cases in some some are headed in a different direction. What probably drove the decision where we review these would be -- the equities of those things in terms of who's here doing what and who's really likely to be heard while the parties try to sort this all out.

So, to me that's kind of the overriding theme to this entire effort and preserving the status quo.

THE COURT: Mr. Bolden.

MR. BOLDEN: Thank you, Your Honor.

Obviously, I disagree with everything that the Plaintiffs have indicated to you.

Let me start off by indicating, and I will kind of track your questions in response to the Plaintiffs in this case. But I will point out one thing we don't agree on the numbers that were just cited by the Washington Hospital Center. We haven't recouped twenty-nine million dollars, whatever the total breakdown was, and since we represent Charter, I can tell you exactly what we've recouped.

Keep in mind that it is our position that the

recoupments for weights as well as coding are mandated by law under CMS rights.

THE COURT: I just want to -- those -- the weights for -- and you said two -- those are the --

MR. BOLDEN: The basis for the recoupments are for the APDRG weights --

THE COURT: Right, okay.

MR. BOLDEN: -- and the other recoupment basis is what we call the NCCI edits or coding.

THE COURT: Okay, I just didn't -- I understand -- your argument that the issue with the APDRG weights is not whether they get made, but when and how and what process has to be filed?

MR. BOLDEN: Absolutely. It's all under the law.

And, Your Honor, the other thing about the weights which is where the majority of the recoupments come in for both Washington Hospital Center and Georgetown have been agreed upon between the parties in the contract.

If you look at the health services agreement between the parties it is painfully clear that as the Department of Health Care Finance makes these weights adjustments or fees and services charged and rates upon which they're charged the parties have agreed to it.

Washington Hospital Center and Georgetown aren't the only providers. DC Charter has five thousand providers,

all of them are getting paid on an ongoing basis, as you have indicated.

But the recoupments for the Washington Hospital Center are about ten point six three million dollars. Eight point six million for the DRG weights and one point six seven million for the code, that's just for Washington Hospital Center.

In connection to Georgetown we've made a total of one point one sixty-six thousand dollars of recoupments that's seven hundred ninety-two thousand dollars of the DRG weights and that's three hundred and seventy-four thousand dollars and some change. And this is in our to papers for the coding, credits.

Now, we haven't just done that with Med Star, we've done that with several other providers. Med Star is the only provider who is in Court today and the only one who has filed suit or objected, that may not be dispositive, but that will be persuasive authority to the Court.

THE COURT: It's in the affidavit of the special deputy.

MR. BOLDEN: You're absolutely right.

Now, what we really have here as His Honor has pointed out is that Med Star understands it's general creditor, it wants to use this Court and injunctive relief

to become a preferred creditor, a special creditor. It wants to be ahead of all of the other providers who we have recouped as a matter of law, as a matter of CMS law, as a matter of the agreements and they'd like to have preferential treatment whether we go into bankruptcy or not.

And by the way we're nowhere near bankruptcy. If you read the total report and you read the audits and I negotiate the deal that brought in the rehabilitator. The rehabilitator didn't come in because we weren't paying our bills, the rehabilitator came in because our mandatory statutory reserves for health care insurance under the law were below the twenty or thirty million dollar mark. There is no evidence whatsoever that we haven't been paying our bills.

This is a company that gets paid thirty million dollars per month and it pays its providers from that thirty million.

THE COURT: In his report the special deputy says, this recent one says, if Charter doesn't get a new MediCaid contract by the middle of January, it's got a big problem.

It is now the middle of January and do you have a new contract with the District of Columbia?

MR. BOLDEN: Well, we have a contract that ends and terminates at the end of April.

THE COURT: Right.

MR. BOLDEN: We have a letter --

THE COURT: But what he was talking about was that you basically need to renew or extend that contract by the middle of January, and you haven't done that.

MR. BOLDEN: Well, we haven't done that because we have a letter agreement with America Care of Health Mercy which is a large health care provider, insurance provider who has agreed by written agreement to bid on the contract that we currently have. They bid on it with our employees and with our executives, the type -- kind of a joint arrangement and while I can't tell you what's going to happen at the end of April, at the end of November or even next year with any company. But I can tell you with my client what's relevant right now is their status right now before this Court, because Washington Hospital Center wants a TRO right now. And this Court is bound by the law and the process to look at what is the status right now and are they entitled to that type of injunctive relief.

Now, you asked about the arbitration clause, okay, the arbitration clause is terribly powerful and important, not only did the parties agree to it twice, they also agreed to the language in the arbitration twice and you'll see that the majority of the numbers come out Washington Hospital Center so the majority of those numbers that we've

recouped are going to be subject to the arbitration clause, that I don't think this Court is going to be able to get around, and, therefore, the jurisdiction has to be go to the arbitrator. Within that arbitration clause it says any dispute. You could read it.

THE COURT: I did.

MR. BOLDEN: But it goes on to say, because this is what the parties agreed to, that both parties gave the arbitrators the power to --

THE COURT: Let me just repeat, if I didn't make it clear it applies to both of you, I've read both sides and I don't need you to repeat what's already in your briefs. I understand, as I said, it's a mandatory arbitration provision and the Judge's rule is that there's mandatory arbitration, the Court stays out, I get that.

MR. BOLDEN: Well, Your Honor, it goes further, and you raised question so I'll to why I'm making this point with you. It goes on to give the arbitrator, because you asked Plaintiff's Counsel this, it goes on to give the arbitrators the power to provide both legal remedies and equitable remedies right there in that provision which means the Plaintiffs in this case had the opportunity to go to arbitration, they ignored it in their brief to you, they had to respond to it in our brief, but then their initial brief they ignored it. They've never made a motion for

arbitration knowing that in that provision that they agreed to twice, they could get equitable relief. They could get a retraining order, and yet they chose this forum versus the forum that they're legally bound to.

So, when you talk to the Plaintiffs about issuing a TRO, in those cases, those line of cases that say you can issue a TRO and then send us to arbitration, we haven't moved for arbitration. We've said that this Court lacks subject matter jurisdiction and if there are any claims and if the Plaintiffs wants their relief and if they want to litigate, they have to arbitrate. It's painfully clear, and under the Uniform Arbitration Act in DC it mandates it, it requires it. I don't think there's anyway around that.

Secondly, Your Honor, the Insurance Commissioner as receiver and rehabilitator, as I indicated, is not -- there's no imminent bankruptcy despite the reports. We've got six million dollars on cash at the end of 2011, fifty-seven million dollars in admitted assets, based on the audit report itself, we've got sixteen million dollars in cash, and when we negotiated the deal, the Insurance Commissioner had the opportunity under the statute to put us in receivership for liquidation or rehabilitation. It was an affirmative decision, because I negotiated the deal, for the Insurance Commissioner to choose, by negotiation, rehabilitation because there was a growing concern. There

was a contract, they were trying to sell the company, they believed that if the Insurance Commissioner took over versus the prior owner took over the assets they could, in fact, make this sale.

THE COURT: I was expecting argument, I wasn't asking you to kind of testify based on your participations in negotiations.

MR. BOLDEN: Yes, Your Honor. I mentioned that twice, I should not have done that.

But in any event, Your Honor, you asked about staying this proceeding at any level, clearly the rehabilitator has a huge job ahead of it, it's got a lot to work with. But the rehabilitator, clearly any order from this Court, whether you believe you lack subject matter jurisdiction or not, any order from this Court would interfere with those rehabilitation efforts.

The rehabilitator has the power to come in and stay this proceeding now. He still has the power to come in to do that, he's chosen not to do, because we don't have a temporary restraining order. We don't have an order that is a prejudicial -- have kind of a prejudicial effect on his work to rehabilitate to sell the company and to protect the hundred and ten thousand poor residents of this City, which is his mission to do, to reform or revitalize.

As I indicated, the other providers have not

objected, the rehabilitator can still come in and stay those proceedings.

And given what the numbers are, given what the balance of interest are, given that the, clearly, the Defense -- the Defendants in this case would be more harmed than Washington Hospital just based on everything we've talked about. And the fact that the weights and the coding for those recoupments were completed already on January 7th.

In order for this Court to issue an order to stay anything, you'd be looking at effectively a mandated injunction, a mandated injunction because there's nothing to restrain us from at this point because we've completed the recoupments and those recoupments aren't to, for any other reason, rooted in the law.

If you look closely at our papers and look at the attachments and look at the agreement as well as the CMS, statutes and regs, it's clear Washington Hospital Center and Georgetown had notice of these adjustments, they tried to negotiate these adjustments after they were done. There's no process for negotiation, or argument or amending of contracts in order to do these recoupments, so we're legally bound. If we're legally bound then, and for all the reasons I've given you, their efforts to receive a TRO, at the close of the arbitration clause, because we're not

in bankruptcy so they can't make out irreparable harm, the likelihood of success on its merits spell -- because we've rooted these in the law as I've indicated the balance of interest weigh fairly on the side of the rehabilitator, and clearly the rehabilitator and DC Charter will clearly suffer more harm than this private entity called Med Star.

It is our position that you ought to dismiss the case, the majority of these claims, and if the Plaintiffs wants to resolve these issues then they have to resolve them in arbitration. But their claims that are not covered by arbitration ought to be dismissed as well because in effect they're asking it to be made a preferred creditor, they cannot make out the elements of injunctive relief. The case law is clear, the facts are clear, and it is our position that the Court ought to rule accordingly.

Thank you.

MR. WAXMAN: Your Honor, if I might --

THE COURT: Yeah, it is your motion and I'll give you a chance to make a brief response.

MR. WAXMAN: Two comments: One, I believe that what Charter's Counsel just said bears repeating, and it's important, he said all of the recoupments have been completed. Now, if that's -- now, if that is the case, if that is the statement of Charter that there aren't any more recoupments, then our request to restrain recoupments with

that representation it sounds like it may well have solved their problem, they're not going to do it any more and they just informed the Court that that's not the case.

The second is if they were going to -- recoupments the note of preferential treatment notes a comment. Recoupments are taking back money that they determined was owed to us and using it for something else. The something else is to prefer somebody else. The Court asked I don't know who they're preferring, how do you know where that money is going and what we were saying if that money was going to us for services we rendered, you shouldn't be preferring anybody else. So, it's actually the reverse.

Thank you.

MR. BOLDEN: Your Honor, if I may just very briefly. My statement about the recoupments being completed had to do with where we are currently. We have a continuing legal obligation going forward on a monthly basis to exercise those recoupments, because it's mandated by law.

THE COURT: Well, I'd understood your comment the way that Mr. Waxman did. When you say they're completed, I mean then it was a meaningless statement. The recoupments that are completed have been completed, but the recoupments that have not been completed, we're still going to make, is that what you're saying?

MR. BOLDEN: No, Your Honor. I'm saying we're legally obligated to recoup --

THE COURT: No. The question is you said all of the recoupments have been completed. I've understood that you've been through all of the payments you've made in the past and any payments that you thought have been overpaid, you've now done some accounting adjustment and you're done.

MR. BOLDEN: That is correct.

THE COURT: So, going forward you're not recouping, you're just maybe reducing claims based on your calculation, but you're not -- recouping goes to kind of basically reevaluation of claims you've paid in the past, and you said you're done with that.

MR. BOLDEN: We're done with that. I have nothing more.

THE COURT: Okay. Well, I've reviewed the papers, I've listened carefully to the arguments, I'm clear on not making a final rulings on the merits because this case is in its early stages, and there's just an application for a TRO, I'm going to go through the factors relevant to the issuance of a temporary restraining order one by one.

The first involves the likelihood of success. I think maybe one adjective that could be used here is uncertain. I think the interpretation of the contracts, the interaction of those contracts with complicated

MediCaid reimbursement rules, I think is difficult. It's certainly isn't clear to me based on what I've seen that there's a high likelihood of success on the Med Star's claim that some of them -- I'm overstating this a bit, but that the thirty-day review is all that Charter has to review claims and then it can't go back and conduct further review after those thirty days are up.

To the extent the issue is recoupment, that's not a continuing problem, as we've just discussed as I understand it. The Charter has completed all the recoupments. It's going to make in addition with respect to the APDRG weights which I understand constitutes the bulk of the money in dispute. There's no agreement that those adjustments are appropriate, it's more of the disagreement about the timing. But Med Star concedes that those modifications ultimately will be adopted.

I don't think I can make a -- either one or two things are going on here, either Charter retroactively reduced claims it properly paid and should have left alone or it turned out that the claims that Med Star committed were higher than they should have been under the contract and the Medicare rules. And I, on this record, can't really resolve this. I assume we don't have any position to make a finding that Med Star is more likely to prevail on that argument than the other.

I also think the ultimate prospects for success are poor on the claims relating to the arbitration to Washington Hospital Center because that's subject to a mandatory arbitration provision that, among other things, gives the arbitrator authority to award equitable remedies. That makes me, I think, particularly reluctant to intervene with respect to that portion of the dispute. I'm an emergency basis and I respect an even stronger showing, you know, on the merits and on the equities before I would essentially -- I don't know -- I wouldn't be preempting what the arbitrators do because whatever I did the arbitrators can subsequently change the arbitration process. The arbitration provision contemplates that, you know, the arbitrators would be in place even within forty-five to sixty days. And I don't think there is a showing that the status quo is going to change radically with respect to Washington Hospital Center within that time.

The second factor involves irreparable harm to Med Star. The economic losses generally are not irreparable injury. I think there is some room under the case law to treat economic losses and irreparable injury if the debtor is insolvent or otherwise near bankruptcy.

I think the record before me indicates that Charter is not insolvent and it's not in bankruptcy or in imminent risk of bankruptcy, which I'm going to define as

days or weeks.

There does appear to be a risk based on the report that the special deputy submitted in the case before Judge Wright, but it is uncertain and not necessarily imminent and there's no indication that it would have occurred before an arbitration panel to be awarded with respect to the Washington Hospital Center, a piece of the dispute and award equitable relief.

Moreover, whether or not on I issue a TRO, Med Star would be a general unsecured creditor, it wouldn't -- the TRO wouldn't benefit Med Star in that respect. Med Star claims irreparable injury from the burden of analyzing the recoupments and adjustments. As best as I can tell both parties are going to go through that process of analyzing these adjustments particularly because the APDRG weights are going to be implemented, if that's the right word, sooner than later, and to the extent that Charter violated its contractual obligations by making those objections -- those changes retroactively and imposed administrative cost on Med Star then it should not have borne those costs may be recoverable as contract damages.

In addition I think the likelihood of dissipation of assets appears to be low because as Med Star contends Charter has an intentive -- incentive to maintain assets to make its balance sheet look good to potential buyers, and

in addition Med Star and other creditors are protected against dissipation of assets and other mismanagement by the rehabilitator who is charged with running Charter responsibly.

The third factor involves the balance of harm. I think the imposition of the issuance of the TRO could have substantial adverse effects on Charter's -- particularly since it includes what amounts to a freeze on a substantial kind of an unknown and an unidentified portion of Charter's cash that in turn could adversely effect the prospects for a sale to a buyer but could provide any capitalization, a result that would hurt Med Star to the extent that Med Star needs a viable Charter in order ultimately to recover thirty million dollars in alleged damages. And, in fact, I'm inclined to think that the ten thousand dollar bond that Med Star opted to post may not come close to protecting Charter against the potential harm from an issuance of a TRO.

Overall, based on this record, it appears to me that the likely harms to Charter from the grant of a TRO seem greater than the possible benefits to Med Star and that that factor favors Charter.

The fourth and last factor is the public interest. For me the main public interest involves whether the hundred and ten thousand dollar MediCaid enrollees are

getting the hospital services they need. As I understand it the dispute between the parties does not directly implicate their ability to receive hospital services and at least for another forty-five to sixty days, as I understand it, Med Star will continue to provide hospital services to MediCaid beneficiaries.

I think I can take in -- considering the public interest -- I can consider kind of the judicial interest on efficiency. I don't think it's in the public interest to have this Court oversee the management of Charter's accounts and cash particularly when there's a rehabilitator who's in place whose appointment was approved by this Court to oversee the financial management of Charter.

I think it would be a substantial burden on the Court if I froze any funds, set them to the side, whether, to what extent funds can be disbursed and to whom.

And I remain concerned as my questions at the beginning suggested, you know, about how the Court, Charter or the rehabilitator could identify, quote, funds that are dedicated or properly should be dedicated to payment of Med Star's claims, and I understand Med Star not to be in a position to identify those funds today. So, the order is unclear -- the requested TRO I think is unclear in its application in its scope.

And I think for all those reasons I deny the

application for a temporary restraining order.

I want to look -- I want to think, look a little bit more and think a little bit more about the request for expedited discovery, I will tell you I'm not inclined to grant that motion particularly with the arbitration issue. There's no motion for a preliminary injunction that's been filed. I don't know whether Med Star will file one or what process it will go through deciding whether or not to do so.

And I'm not -- to the extent that Charter has moved to dismiss the claims involving Washington Hospital Center based on the arbitration provision -- well, let me make sure, as I understand it Med Star agrees that the only portion of the dispute involving Hospital -- Washington Hospital Center the Court has jurisdiction to adjudicate involves a request for preliminary injunctive relief pending appointment of the arbitrators, is that correct?

MR. WAXMAN: No. A couple of points. One, of course, the motion to dismiss isn't before the Court today.

The second is what the law says --

THE COURT: But I'm just trying to think --

MR. WAXMAN: I understand. What I think the law is on the existence of an arbitration clause the case isn't dismissed it's actually held in abeyance as it goes off to

determine whether there's arbitration and then ultimately arbitration.

The reason I raised both of those is I think it's -- I understand where the Court is headed, but I think it's both procedurally not quite right and substantively you wouldn't dismiss the case anyway.

THE COURT: Well, let me put it this way, I would encourage you all to talk about where you are and how you want to handle the case in terms of arbitration, where you're going to go with that, when you're going to nominate arbitrators, how you want to proceed on that front. Will the case be stayed, to what extent it would be stayed, how is the fact finder is in agreement about the bulk of the disputed money involving Washington Hospital Center and then what sense could it make to proceed with the portion of the case involving Georgetown if the same or very similar issues are being resolved in the arbitration. If there's a right to discovery.

I mean it maybe to the extent that you want discovery, I mean it makes sense to talk about discovery if you're going to get it in arbitration or if you're going to -- I think the information I think was new information, the recoupments have been completed, that whatever money they're going to recoup, I don't know how that changes kind of the dynamics of the situation, if I can call them that,

but I think it would make sense for you all, you know, to talk.

I mean at some point I'm going have to -- I guess -- I guess what I'm inclined -- because I don't want to -- would it make sense for me to hold off on doing anything else now until you all have had a chance to talk and maybe submit some kind of joint status report and I could schedule a status conference?

MR. BOLDEN: Well, Your Honor, there is a motion for partial -- there is a partial motion to dismiss before the Court. The Washington Hospital Center has not responded -- has had not an opportunity to respond to it yet.

But it is our position is that why belabor it if both sides -- I'm not going to put words in their mouth, but both sides seem to acknowledge the arbitration agreement while ninety or more percent --

THE COURT: I agree. That's why I suggested that you talk about that because if you can talk about -- rather than to dismiss that portion of the case, to stay that portion, I think Mr. Waxman's point about what the relief is. I mean I don't want to put either side to the burden of briefing things if there are things that you all can work out, frankly. I don't want to take my time working through the issues.

I mean if there were -- I take it -- I think both sides agree that on there have been continuing negotiations between the lawyers and the business people. Sometimes those have gone well and then you've actually reached some agreements. Sometimes they've not gone so well. And I certainly understand Med Star's interest in their Georgetown, Washington Hospital Center are both non-profit institutions in getting paid. They've provided real service, they've real costs in providing for those services and they want to get pay.

I didn't hear Mr. Bolden dispute that you haven't gotten paid a dime, you know, for some weeks now. I understand that's an issue for you. I just don't know if there is some room for you all to sit down and figure out a way, you know, forward. It could include on the business side, you know, what's going to get paid, what's the schedule, what's going to happen with the arbitration, to what extent this case is going to go forward, whether discovery is going to go forward.

And we're only -- and discovery, we're only talking about a couple weeks at this point because you have a right to start considering the end of the month?

MR. EDMONDSON: Your Honor, to that point we did serve our discovery with our motion to expedite discovery. So, we -- the date that we chose for the deposition that we

intend to take is within -- it's outside of the thirty days of service and the written discovery will be due on February 10th and we were asking you to have it moved up to the next week, so it is just a matter of few weeks.

THE COURT: Well, like I said I'm not inclined to do that. I denied the request for the TRO. There's no preliminary injunction motion pending at this point. But what I want you all to do is just sit down and see if you can, granted, move forward.

I can set this for a status hearing. I'm not here next week. I could do it the week after next for you all to submit a joint status report. I'm open to suggestions.

MR. BOLDEN: Your Honor --

THE COURT: I'm trying to do this efficiently for everbody.

MR. BOLDEN: May I beg the Court's indulgence and confer with my colleague?

THE COURT: Absolutely.

(Pause in Proceedings.)

MR. WAXMAN: I think what makes sense for both of us after the brief discussion is to file a joint status report with the Court, perhaps, two weeks, and if we think we would value a status conference, we can call the Court and, perhaps, the Court would.

THE COURT: Call my chambers and --

MR. WAXMAN: -- come in and --

THE COURT: -- we will set it up.

MR. WAXMAN: -- we'll talk about it relatively short order after that, and that gives us a little time to digest this and work this out.

THE COURT: January 30th. That's going to be a Wednesday.

MR. WAXMAN: Is that for the report or the conference?

THE COURT: No. You said two weeks for a joint status report.

MR. WAXMAN: Right.

THE COURT: So --

MR. WAXMAN: That's fine.

MR. BOLDEN: Yes, Your Honor.

THE COURT: Okay.

MR. BOLDEN: I think January the 30th. Just the report January 30th would be fine.

THE COURT: I actually didn't look at that, but I expect the next event on the docket is the initial scheduling conference.

THE DEPUTY CLERK: March 22nd.

THE COURT: March 22nd. I have no desire to bring you in. One of the things you're going to be talking about is the schedule and one of the things you might want

to address then is, you know, I don't know -- I don't know kind of address the issue of arbitration and the claims of Washington Hospital Center versus Georgetown, how that all works. I'm quite confident this is not a track one case. You know, is it track two? Is it track three? But, you know, I don't -- there's no Jury demand, is there?

MR. EDMONDSON: Yes.

THE COURT: There is a Jury demand. Well, I mean -- I mean I encourage you to kind of just think longer, longer term. Okay.

MR. BOLDEN: Thank you, Your Honor.

MR. WAXMAN: Thank you, Your Honor.

(Whereupon, hearing concluded.)

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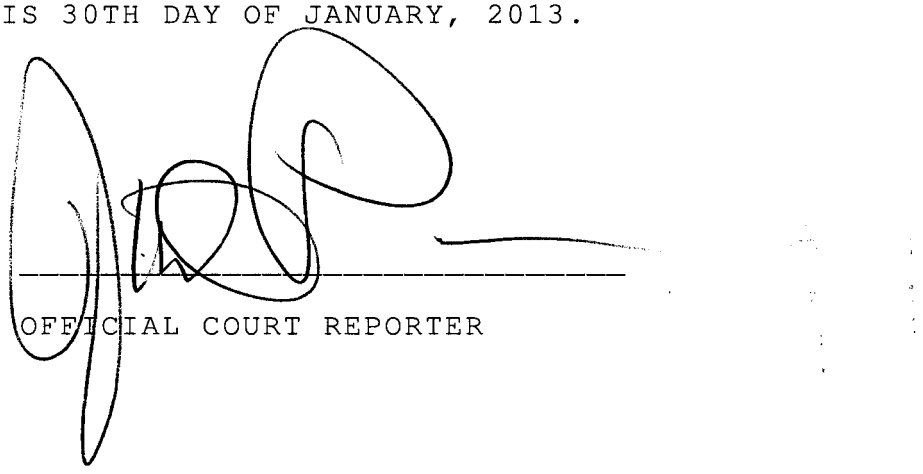

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