



MedStar's Motion and its request for More Definite Statement,<sup>1</sup> Indeed, the Rehabilitator wishes to avoid a fundamental problem with this rehabilitation proceeding: the lack of information, notice and access for creditors like MedStar. Furthermore, in the Rehabilitator's view, there appears to be no set of circumstances that would entitle a creditor of Chartered to be heard on issues pertaining to the implementation of the Rehabilitator's Plan or concerns regarding administration of the Rehabilitation estate. While the Rehabilitator's approach appears unwarranted, this Court has permitted (and even encouraged) another non-party creditor, DCHSI, to bring forth its grievances, even though its claims are behind those of MedStar and the other health care providers.

MedStar has more than met the requirements for intervention under Rule 24, and the Rehabilitator's arguments to the contrary are both inappropriate and troubling. The position taken by the Rehabilitator – that somehow his actions are not to be questioned, even by the very parties he claims to “represent” for Rule 24 purposes but now labels as “second-guessers”<sup>2</sup> – deprives interested parties of the ability to have this court determine, based on a meaningful presentation of the facts, that the Rehabilitator's plan is “fair and equitable to all parties concerned,” both as conceived and as “carried out.” D.C. Code § 31-1312(e).

Instead of recognizing that the reality that, the Rehabilitator is likely adverse to the creditors, the rehabilitator asserts (without any authority for the point) that he can both adjudicate the claims, and at the same time represent the creditors, all without oversight or providing any information about how this has, and will actually proceed. The Rehabilitator's

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<sup>1</sup> MedStar's Motion for More Definite Statement has not been docketed, pending this Court's decision on the Motion to Intervene.

<sup>2</sup> Rehabilitator's Memorandum in Opposition to Motion to Intervene (“Opp.”) at 6, 7.

desire to squelch the voices of interested parties here undermines fundamental notions of fairness and the interests of justice, and should not be permitted.

### DISCUSSION

A. As Long as the Rehabilitator's Activities Are Under the Supervision of this Court, Interested Parties Must be Permitted to Intervene and Raise Issues for Consideration.

The Rehabilitator's acts are subject to review, both to determine whether they comply with the statutory requirements, and are not arbitrary and capricious. The Rehabilitator concedes this. *See* Opposition to Motion to Intervene, filed April 22, 2013, at 2 (“subject to this Court’s review and approval,” “under this Court’s supervision”), 3 (“and the Court’s oversight of his actions”). For this to occur, as this Court has already recognized, interested parties should have the right to come forward and have their concerns aired. For example, this Court has invited creditors in need of information to petition the Court for assistance.<sup>3</sup> Even more significantly, the Court has permitted Chartered’s parent and shareholder DCHSI to appear in this proceeding, and raise: (a) its objection to the Sale of the Chartered Medicaid plan to Amerihealth Mercy, filed February 26, 2013, and pursuant to which this Court permitted counsel for DCHSI to argue at a hearing for that purpose which occurred on March 1, 2013; (b) a Motion to Stay this Court’s March 1, 2013 Order approving such sale, filed on March 6, 2013 and denied

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<sup>3</sup> At the March 1, 2013 hearing, counsel for Chartered’s parent, DCHSI, complained to this Court that his client had been “kept in the dark” and that the Rehabilitator had not provided DCHSI with information regarding the Rehabilitator’s actions. This Court replied:

So, if they didn’t provide it voluntarily, why didn’t you file a request of the Court to compel them to provide you with the information.

Transcript of March, 1, 2012 Hearing, p. 29, ll. 11-13 (filed March 15, 2013). It is in the spirit of the Court’s guidance that MedStar seeks to intervene and present its Motion for More Definite Statement.

by this Court on April 2, 2013; and (3) a Motion to Compel the Rehabilitator to Pursue Chartered Claim Against the District of Columbia, filed on April 2, 2013, which has not yet been ruled upon.

When DCHSI filed its objection to the sale, the Rehabilitator responded by contesting DCHSI's status, stating that it "is not a proper party to this litigation." *See* Petitioner's Response to DCHSI's Motion in Opposition, filed February 25, 2013. Nevertheless, the Court accepted the pleading, and heard argument at the March 1, 2013, status conference, thereby treating DCHSI as a "Party-in-Interest". *See also* April 2, 2013 Order denying DCHSI's Motion to Stay. DCHSI's party-in-interest status, however, derives – like MedStar's – from its status as a creditor under the Plan of Reorganization (which embodies the statutory priority of creditors under D.C. Code § 31-1340) as Chartered's landlord, and as Chartered's sole shareholder – being entitled to dividends and any residual from remaining assets after all creditors of Chartered are paid. *See* Transcript of March 1, 2013 hearing, filed March 15, 2013, at p. 6.

MedStar is also a creditor, and significantly, Chartered's single largest provider creditor, if not its largest creditor overall. Moreover, under the Plan and the statute, MedStar's interests stand significantly ahead of DCHSI's because MedStar's claims must be paid *in full* before DCHSI receives any dividend or residual from the administration (or liquidation) of the Chartered estate.<sup>4</sup> For reasons that are unclear, DCHSI has managed to participate fully in these

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<sup>4</sup> *See* Rehabilitator's Plan of Reorganization, contained in Second Status Report, filed Feb. 22, 2013, and D.C. Code § 31-1340 (providing that claims of providers, like MedStar, are Class 3 claims; DCHSI's claims as landlord and shareholder will fall well below MedStar's, within Class 6 and Class 9, respectively). That said, MedStar continues to believe, and at the appropriate time will support, that a portion of its claims are Class 1(B) as "authorized services

proceedings without filing a motion to intervene. MedStar has done what it believed to be the procedurally responsible thing by filing a Motion to Intervene, but is now being forced by the Rehabilitator to battle its way into the Moultrie Courthouse for an opportunity to address its concerns and requests to this Court.

B. MedStar Has Important and Valid Concerns That Should be Considered by the Court.

MedStar filed its proposed Motion for More Definite Statement,<sup>5</sup> as an accompaniment to the Motion to Intervene, not only in order to comply with Rule 24, but also to inform the Court of MedStar's concerns and request information that might substantiate them. As it turns out, however, the mere filing of the proposed Motion has, it appears, already induced action on the part of the Rehabilitator.

On April 19, 2013, the Rehabilitator announced in his Third Status Report (at p. 5) that he was "suspending Class 3 payments to providers as of April 19, 2013." This, MedStar believes, was likely a direct response to an issue it raised in its proposed Motion for Definite Statement. MedStar expressed its concern that the order in which the Rehabilitator was paying claims was not in accordance with the Plan (or the statute) when it noted:

The Sur-Reply filed by the Rehabilitator on March 28, 2013, however, gives some indication that both current and historical claims are being paid, but provides no rhyme, nor reason why

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rendered in the rehabilitation." If that argument prevails, in fairness, a portion of DCHSI's claim as landlord may, in fact, be elevated to Class 1(B), but that amount that would be on par with MedStar would, upon information and belief, be extremely small, in comparison to the size of MedStar's claim.

<sup>5</sup> The proposed Motion was filed as Exhibit 1 to a Supplemental Memorandum filed on April 17, 2013. While the title "Motion for More Definite Statement," may seem unusual, it is most descriptive of the main relief MedStar seeks: more detail in the Rehabilitator's status reports and communications regarding the Plan of Reorganization and his administration of the Rehabilitation estate.

some are, and others, like the undisputed portion of MedStar's are not. Specifically, the Rehabilitator is now reporting that Chartered's "year-end financial statements will show that Chartered experienced approximately \$15 million in losses in the 4th quarter of 2012, averaging about \$5 million per month, primarily due to (a) **processing and paying a significant backlog of claims that pre-date the rehabilitation**, and (b) higher than anticipated provider claims due to flu, asthma and respiratory infections." Sur-Reply at 4 (emphasis added).

Proposed Motion for More Definite Statement (Exhibit 1 to Supplemental Memorandum, filed on April 17, 2013), at 11. Simply stated, MedStar's concern was, and remains, that it has disputed claims totaling over \$37 million that need to be resolved through a pending arbitration, and if the Rehabilitator is processing and paying aged claims of other providers, he may well deplete the assets that are available to ensure that MedStar's recovery on its claims (once they are determined)<sup>6</sup> is on par with other providers. Thus, while the Rehabilitator complains that MedStar's request for "adequate reserves" would "tie the Rehabilitator's hands," (Opp. at 4), the Rehabilitator's suspension of payments to all providers is likely a recognition that MedStar's concerns are valid and that assets, in fact, must be preserved (and ultimately distributed in a legally acceptable way).

MedStar raises several other concerns in its proposed Motion for Definite Statement, which the Rehabilitator does not address, and by his opaque Opposition, clearly does not desire not to address. But, the evidence that MedStar has derived from the scant publicly-

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<sup>6</sup> Importantly, and contrary to the Rehabilitator's unsupported assertion, MedStar does not seek "preferential treatment" for itself, nor does it seek to "advance [payment of] its disputed provider claims." (Opp. at 6). Rather, MedStar recognizes, and its proposed Motion for More Definite Statement clearly indicates, that it will wait its turn for payment, but in the meantime, other creditors cannot be paid so much on their claims that MedStar will be denied, ultimately, its fair, *pro rata* share of the funds available for payment. Moreover, obviously, any treatment of MedStar's claims must be applied equitably to any other provider who is similarly situated. The statute does not permit, nor does MedStar seek, a preference.

available information, indicates that decisions are being made, and have been made, that appear to be inconsistent with the legal requirements and are in need of transparency with respect to the facts, and of understanding by the creditors, and likely, of careful review by the Court. Among these, there has never been an explanation of why some claims were paid after the rehabilitator was appointed, and some where not, or on what basis they were paid.

By denying MedStar's right to seek information that should have been made available in a Status Report to begin with, and allow obviously interested parties to review the plan for payment of creditor claims, and raise factual and legal compliance issues with the Court, the Court is simply not able to engage in its mandated review of the "discretion" being exercised by the Rehabilitator. Perhaps, as the Rehabilitator attempts to assure both MedStar and the Court – all without addressing the issues actually raised – it may be there is nothing to be concerned about. But, the creditors and this Court will never know unless the information is made available and objections, if any, are formally raised. This is, after all, the very purpose for which intervention exists.

C. MedStar Meets the Requirements of D.C. Superior Court Rule 24.

**1. MedStar's Motion to Intervene was Timely Filed.**

The Rehabilitator claims that MedStar's Motion to Intervene was untimely because it was filed six months after this Court's rehabilitation order, while at the same time acknowledging that MedStar attempted enter a notice of appearance (the same procedure that DCHSI used to get itself before the Court) only a month before filing its Motion to Intervene. Opp. at 3. The Rehabilitator fails to acknowledge, however, that MedStar engaged in good-faith discussions to resolve its concerns informally through discussions with the Rehabilitator beginning the day of the March 1<sup>st</sup> hearing (the same day its Notice of Appearance was rejected

by the Clerk's office), and continuing through the day the Motion to Intervene was filed. That MedStar acted promptly under the circumstances is established by the following:

- A Plan regarding the treatment of creditor claims was not proposed by the Rehabilitator until February 22, 2013. Obviously, MedStar could have no basis to question or contest something that, before that date, did not yet exist.
- Once filed, the ability of MedStar, or any creditor, to react to the Plan was effectively thwarted by the following:
  - There was no document entitled "Plan of Reorganization." Rather the entirety of the Plan is merely summarized within two pages of the "Special Deputy to the Rehabilitator's Second Status Report, Request for Expedited Status Conference and Petition for Order Approving the Asset Purchase Agreement, Plan of Reorganization and Related Matters on or before March 5, 2013";
  - No notice was given to creditors that a Plan had been proposed, other than a posting on the D.C. Department of Insurance, Securities and Banking's ("DISB") website;
  - No objections or comments to the Plan were solicited by the Rehabilitator;
  - The Plan was brought up for approval at a hearing before the Court on March 1, 2013, with no explicit notice of the hearing given to creditors, even on the DISB website ;
  - Creditors, like MedStar, who were diligent enough to learn that a hearing would be occurring, thought that the hearing was a "status conference," presumably to set a briefing schedule, because that was how it was referred to on the Court's docket;
  - The March 1, 2013 hearing, which was attended by counsel for MedStar, concerned only DCHSI's objection to the sale of assets to Amerihealth Mercy and did not discuss the provisions of the Plan regarding payments to creditors, but nevertheless, the Order presented by the Rehabilitator and signed by the Court approved the Plan as proposed;
- MedStar did not oppose the sale of certain of Chartered's assets to Amerihealth Mercy, which was the dominant issue in the dispute between DCHSI and the Rehabilitator, and thus did not seek to involve itself in that briefing or argument on that issue.
- MedStar initially had insufficient information to raise, in any concrete fashion, its concerns about the payment of creditors, but through the ensuing dialogue with the Rehabilitator and his counsel, including detailed review of the limited information that the Rehabilitator filed in briefing its positions in its dispute with



DCHSI during the month of March, MedStar was able to form well-defined concerns that merited the filing of the Motion to Intervene and the proposed Motion for More Definite Statement.

By any measure, MedStar acted promptly. Unlike the proposed intervenor in *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 15-16 (D.C. 1981), cited by the Rehabilitator, MedStar is not seeking to “relitigate an already concluded action” and the relief it seeks would not “necessitate[] an especially wasteful and duplicative expenditure of judicial resources.” To the contrary, there is still more than adequate time to deal with these new issues that MedStar is bringing to the fore. There is no claim bar date, the illiquid assets are far from being collected, and the Rehabilitator has suspended payments to providers, which *partially* preserves the status quo. Accordingly, the Rehabilitator’s arguments regarding timeliness should be rejected.

## **2. The Rehabilitator Does Not Adequately Represent MedStar’s Interests.**

While the Rehabilitator certainly has a statutory responsibility “to protect the interests of Chartered’s creditors, as well as those of Chartered, its enrollees and the public” (Opp. at 5), those interests, unfortunately are far from perfectly aligned. Thus, the notion that a rehabilitator can represent the interests of any particular creditor, such as MedStar, so as to defeat that party’s right to intervene, is simply inconsistent with the his multi-faceted role. The Rehabilitator obviously is and will continue to make decisions regarding payment of claims that, adversely affect some creditors. There is no legal basis to claim that those decisions are beyond question by the affected creditors.

Nor does the fact that the Rehabilitator can be considered “a governmental entity” necessarily mean that he is an adequate representative. Opp. at 8-9. In *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 801 (D.C. 1975), a case relied upon by the Rehabilitator for this proposition, the Court of Appeals allowed intervention, finding that that the intervenors were

not “adequately represented by the District government, notwithstanding its good faith belief that it [was] acting in the best interest of the city at large.” Moreover, in *District of Columbia v. Greater Washington Cent. Labor Council*, 442 A.2d 110, 120 (D.C. 1982), the court explained that the deferential principal that the Rehabilitator extracts from that case (Opp. at 8) applies in situations when intervention is sought “on the side of the government,” which obviously is not the case here. Indeed in *Greater Washington*, the Court held that the proposed intervenor (the D.C. Board of Trade) sought to present the same “claim” as the District government, and therefore denied intervention on the grounds of adequate representation. *Id.* at 120.

The difference in interests between MedStar and the Rehabilitator is no “slight difference.” *Vale Properties*, 431 A.2d at 15. The Rehabilitator cannot be an effective representative of MedStar, when, in fact, he is MedStar’s adversary in the pending AAA arbitration which MedStar filed against Chartered to resolve the dispute over the amount of its claim. As the individual who fully controls all the business activities of Chartered, including its decision to deny MedStar’s disputed claims, and direct the conduct of Chartered’s defense to MedStar’s arbitration claims, he is actively litigating *against* MedStar’s interests, not representing them.

### **3. MedStar’s Interests Are Impaired.**

The Rehabilitator does not argue that MedStar lacks an interest in the Rehabilitation proceeding, as it clearly does. *See Calvin-Humphrey*, 340 A.2d at 799 (holding that the word “interest” is to be read broadly in light of the purpose of “involving as many apparently concerned persons as is compatible with efficiency and due process”).<sup>7</sup> Rather, the

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<sup>7</sup> The Rehabilitator cites *Calvin-Humphrey*, internally cited by *Jones v. Fondufe*, 908 A.2d 1161 (D.C. 2006), for the principle that MedStar’s interests should be weighed against

Rehabilitator attacks MedStar's effort to intervene, and thereby gain access to communicate its concerns to this Court, because its argument that its interests are impaired is speculative and lacks support. Opp. at 5. The Court need look no further than to the Rehabilitator's recent disclosure that he has been paying historical provider claims that pre-dated the rehabilitation proceeding, followed by his abrupt suspension of payment of all provider claims once MedStar articulated its concern that its interest in pro-rata treatment of its claims was potentially being impaired by those payments, as both a prime example, and recognition by the Rehabilitator himself, that the interests of MedStar and other creditors were being impaired.

In addition, the right to sufficient information to understand and evaluate the Rehabilitator's administration of the estate is an interest of MedStar that has been impaired by the Rehabilitator's scant release of information. MedStar seeks to address that impairment directly by the relief it seeks in its proposed Motion for More Definite Statement. Despite the Rehabilitator's assertion that he already has "plans for an orderly and timely claim submission and determination process" and has made "detailed reports to the Court regarding claim liabilities and assets available," (Opp. at 8), such "plans" are yet to be unveiled, and such reports, until very recently, have been grossly outdated, and even now lack sufficient detail for creditors to evaluate whether their interests are, in fact, being adequately protected by this Rehabilitator's actions, or if the Rehabilitator is carrying out the Plan and following the law.

While the Rehabilitator's Third Status Report provides, for the first time, current financial information (perhaps an attempt to respond to MedStar's criticism that his prior status reports contained only aged financial data that preceded his appointment), that information

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"judicial efficiency and the orderly Rehabilitation of Chartered." Opp. at 7. Neither case espoused, or even refers to, such a balancing test. Both permitted intervention.

remains insufficient because it merely expresses an estimate of total claims and total assets. MedStar remains in the dark as to how the Rehabilitator values MedStar's claims and the claims of other providers, among other things. And, now that the Rehabilitator has suspended payment of provider claims, it is more important than ever that he demonstrate to the satisfaction of this Court that he is being efficient in controlling administrative expenses, which he continues to accrue and pay from what is now a limited pot of money. Since every dollar that the Rehabilitator pays to himself, his lawyers, professionals and others depletes that amount that MedStar (and other provider creditors) may draw upon to satisfy their claims, MedStar has an interest in reviewing the history of prior receipts and payments, and ensuring that future receipts and expenditures be disclosed and monitored.

As final example, MedStar's right to obtain payment from the Rehabilitation estate may be impaired if the Rehabilitator were to compromise or fail effectively to pursue any of Chartered's actions against the District or third parties that would result in less-than-adequate funds to pay MedStar's claim. These are not idle concerns, but real issues that a creditor should be permitted to monitor and, if appropriate, be heard upon.

### **CONCLUSION**

The Rehabilitator protests:

If MedStar is permitted to intervene as of right then any and all 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.

Opp. at 7. To paraphrase Shakespeare, MedStar thinks he protests too much. Hamlet, Act III, scene II. The Rehabilitator has nothing to fear from conducting an open proceeding that allows the participation of creditors.

For the reasons set forth in its Motion to Intervene, Supplemental Memorandum

