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: Wright Next Event: Status Hearing August 21, 2013 at 9:30 a.m.

REHABILITATOR'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MOTION FOR ORDER APPROVING THE SETTLEMENT AGREEMENT BETWEEN D.C. CHARTERED HEALTH PLAN, INC. AND THE DISTRICT OF COLUMBIA

The Rehabilitator of D.C. Chartered Health Plan, Inc. ("Chartered") seeks leave to file a reply in support of the *Motion for an Order Approving the Settlement Agreement Between D.C. Chartered Health Plan, Inc. and the District of Columbia*, as set forth in the accompanying Points and Authorities. Party-in-Interest D.C. Healthcare Systems, Inc. ("DCHSI") raises several new matters in its opposition brief that the Rehabilitator should have the opportunity to address. The reply brief is attached as Exhibit A.

Counsel for the District of Columbia, the other party in this matter, consents to this motion.

August 16, 2013

Respectfully submitted,

TROUTMAN SANDERS, LLP

/s/ Prashant K. Khetan

Prashant K. Khetan
Bar Number 477636
401 9th Street, NW Suite 1000
Washington, D.C. 20004
(202) 274-2950
(202) 274-2994 (facsimile)
prashant.khetan@troutmansanders.com

/s/ David K. Herzog

David K. Herzog (admitted *pro hac vice*)
Faegre Baker Daniels LLP
300 N. Meridian Street, Suite 2700
Indianapolis, Indiana 46204
(317) 237-1240
David.Herzog@faegrebd.com

Attorneys for the Rehabilitator and the Special Deputy to the Rehabilitator

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2013, a copy of the foregoing was filed and served by email upon:

William P. White, Rehabilitator
c/o Stephanie Schmelz
DISB, Office of the General Counsel
810 First St., NE, Suite 701
Washington, D. C. 20002
Stephanie.Schmelz@dc.gov

Daniel Watkins
Special Deputy Rehabilitator
1050 K Street NW, Suite 400
Washington, DC 20001
danwatkins@sunflower.com

Charles T. Richardson
Faegre Baker Daniels LLP
1050 K Street NW, Suite 400
Washington, DC 20001
crichardson@faegredb.com

Stephane J. Latour
E. Louise R. Phillips
Assistant Attorney Generals
441 Fourth Street, NW, 630 South
Washington, D.C. 20001
Louise.Phillips@dc.gov
Stephane.Latour@dc.gov

David Killalea
Manatt, Phelps & Phillips, LLP
700 12th Street, NW Suite 1100
Washington, DC 20005-4075
dkillalea@manatt.com

J. Jonathan Schraub
Sands Anderson PC
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
JJSchraub@SandsAnderson.com

_/s/ Prashant K. Khetan___

Prashant K. Khetan

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: Wright Next Event: Status Hearing August 21, 2013 at 9:30 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE REHABILITATOR'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MOTION FOR ORDER APPROVING THE SETTLEMENT AGREEMENT BETWEEN D.C. CHARTERED HEALTH PLAN, INC. AND THE DISTRICT OF COLUMBIA

The Rehabilitator of D.C. Chartered Health Plan, Inc. ("Chartered") seeks leave to file a reply brief because the Party-In-Interest's Opposition introduces additional arguments and putative facts, including several misunderstandings and misstatements of the factual record that the Rehabilitator has not had an opportunity to address. The Court should grant the Rehabilitator's motion in order to allow Chartered to address the new facts and arguments and correct the record. The D.C. Superior Court Rules of Civil Procedure do not address whether a party is entitled to file a reply brief, and therefore the decision is within the sound discretion of the Court. For the reasons stated above, a reply is reasonable and necessary to correct the Opposition's errors. The Court should grant the Rehabilitator leave to file a reply and deem the attached reply filed.

August 16, 2013

Respectfully submitted,

TROUTMAN SANDERS, LLP

/s/ Prashant K. Khetan

Prashant K. Khetan
Bar Number 477636
401 9th Street, NW Suite 1000
Washington, D.C. 20004
(202) 274-2950
(202) 274-2994 (facsimile)
prashant.khetan@troutmansanders.com

/s/ David K. Herzog
David K. Herzog (admitted *pro hac vice*)
Faegre Baker Daniels LLP
300 N. Meridian Street, Suite 2700
Indianapolis, Indiana 46204
(317) 237-1240
David.Herzog@faegrebd.com

Attorneys for the Rehabilitator and the
Special Deputy to the Rehabilitator

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: Wright Next Event: Status Hearing August 21, 2013 at 9:30 a.m.

ORDER GRANTING
THE REHABILITATOR'S MOTION FOR LEAVE TO FILE A REPLY

Upon consideration of the Rehabilitator's Motion for Leave to File a Reply in Support of Motion for Order Approving the Settlement Agreement Between D.C. Chartered Health Plan, Inc. and the District of Columbia, any opposition thereto, and the entire record herein, it is the ___ day of ________________, 2013,

ORDERED: That the Motion for Leave to File a Reply is granted; and it is

FURTHER ORDERED: That the Reply is deemed filed as of this date.

____
Melvin R. Wright
Judge, D.C. Superior Court

Copies to:

Prashant K. Khetan
Troutman Sanders LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
prashant.khetan@troutmansanders.com

21193473v1

David K. Herzog (admitted *pro hac vice*)
Faegre Baker Daniels LLP
300 N. Meridian Street, Suite 2700
Indianapolis, Indiana 46204
David.Herzog@faegrebd.com

William P. White, Rehabilitator
c/o Stephanie Schmelz
DISB, Office of the General Counsel
810 First St., NE, Suite 701
Washington, D. C. 20002
Stephanie.Schmelz@dc.gov

Daniel Watkins
Special Deputy Rehabilitator
1050 K Street NW, Suite 400
Washington, DC 20001
danwatkins@sunflower.com

Charles T. Richardson
Faegre Baker Daniels LLP
1050 K Street NW, Suite 400
Washington, DC 20001
crichardson@faegredb.com

Stephane J. Latour
E. Louise R. Phillips
Assistant Attorney Generals
441 Fourth Street, NW, 630 South
Washington, D.C. 20001
Louise.Phillips@dc.gov
Stephane.Latour@dc.gov

David Killalea
Manatt, Phelps & Phillips, LLP
700 12th Street, NW Suite 1100
Washington, DC 20005-4075
dkillalea@manatt.com

J. Jonathan Schraub
Sands Anderson PC
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
JJSchraub@SandsAnderson.com

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA, Department of Insurance, Securities and Banking, Petitioner, v. DC CHARTERED HEALTH PLAN, INC., Respondent.	Civil Action No.: 2012 CA 008227 2 Judge: Wright Next Event: Status Hearing August 21, 2013 at 9:30 a.m.

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ORDER APPROVING THE SETTLEMENT AGREEMENT BETWEEN D.C. CHARTERED HEALTH PLAN, INC. AND THE DISTRICT OF COLUMBIA

The Rehabilitator of D.C. Chartered Health Plan, Inc. ("Chartered") properly exercised his authority to "take such action as deemed necessary or appropriate to reform and revitalize Chartered" when he negotiated a reasonable settlement of Chartered's claims against the District of Columbia Department of Health Care Finance ("DHCF"). *See* October 19, 2012, Emergency Consent Order of Rehabilitation at 2; D.C. Official Code § 31-1312(c) (2001). The Rehabilitator's opening brief explained the settlement's benefits and why it merits court approval now: it is a settlement recovering fair value for pending and potential claims, while avoiding all of the risks, time and costs of litigation. Nothing in the lone opposition brief alters that analysis.

In its opposition, D.C. Healthcare Systems, Inc. ("DCHSI") resurrects its unsuccessful and repeated strategy to substitute its judgment for the Rehabilitator's authority and put its own interests ahead of all others affected by Chartered's receivership. This Court once again should reject DCHSI's self-interested strategy. Nor should the Court be diverted to the mini-trial for which DCHSI implicitly advocates while it mischaracterizes key facts. The Court has more than sufficient information to determine that the settlement here is fair, reasonable and adequate.

ARGUMENT

I. DCHSI Improperly Seeks to Substitute Its Judgment for that of the Rehabilitator Who Properly Exercised His Authority

This is not the first time that DCHSI and its sole shareholder, Jeffrey Thompson, have sought to substitute their judgment for that of the Rehabilitator. In March, DCHSI sought a stay of proceedings pending its appeal of the Court's decision to approve the Plan of Reorganization (including the asset sale to AmeriHealth). Among other things, DCHSI criticized the asset sale to AmeriHealth—even though DCHSI had six months to put together a deal for Chartered and failed to do so prior to Chartered's rehabilitation. By its motion to stay, DCHSI sought to put its own interests ahead of those of Chartered's enrollees, employees and healthcare providers. Denying that motion, the Court stated that "the Rehabilitation Code obligates the Rehabilitator to act in the best interest of the company, not the best interest of the parent company." *See* April 2, 2013 Order Denying DCHSI's Motion for Stay at 2.

DCHSI then filed a motion on April 2, 2013, to compel the Rehabilitator to pursue Chartered's claims against DHCF in the manner that DCHSI preferred rather than as the Rehabilitator had chosen to pursue them. In opposing that motion, the Rehabilitator explained that the decisions he was making and the strategy he was pursuing with respect to the DHCF claims were informed by his duty to "take such action as deemed necessary or appropriate to reform and revitalize the insurer" pursuant to D.C. Code § 31-1312(c) and this Court's Rehabilitation Order. *See* Rehabilitator's April 19, 2013 Opposition to D.C. Healthcare Systemd, Inc.'s Motion to Compel ("Apr. 19 Opp.") at 5. As the Rehabilitator stated, "DCHSI is thus asking the Court to order the Rehabilitator to perform a duty he is already undertaking: using his best judgment to reform and revitalize Chartered." *Id.* The Rehabilitator continued:

> It is well established that in exercising his statutory powers, a "rehabilitator is granted authority to make judgments and take actions he believes to be in the

> public interest. The trial court's primary role is a supervisory one and the standard of the court's review of the rehabilitator's actions is one of abuse of discretion." *Kentucky Central Life Insurance Company v. Stephens,* 897 S.W.2d 583, 587-88 (Ky. 1995). "As the program of rehabilitation takes form and the steps unfold, the trial court in its supervisory and reviewing role may not substitute its judgment for that of the Commissioner, but may and should only intervene or restrain when it is made to appear that the Commissioner is manifestly abusing the authority and discretion vested in him and/or is embarking upon a capricious, untenable or unlawful course." *Kueckelhan v. Federal Old Line Ins. Co. (Mutual),* 444 P.2d 667, 674 (Wash. 1968).

Apr. 19 Opp. at 8. This Court denied DCHSI's request to interfere with the Rehabilitator's handling of the DHCF claims just as it had denied DCHSI's effort to put the rehabilitation on hold while it sought to reverse the Rehabilitator's strategy calls in the Court of Appeals. In language that is equally applicable to DCHSI's current motion, this Court held that "[t]his Court's role in the rehabilitation process is to supervise the Rehabilitator and *review the Rehabilitator's actions for abuses of discretion, not to substitute the Court's judgment, or the judgment of a parent company, for that of the Rehabilitator*." *See* May 9, 2013 Order Denying DCHSI's Motion to Compel at 1 (emphasis added).

DCHSI's opposition to the settlement with DHCF is another piece in a familiar pattern. Here, DCHSI is criticizing the Rehabilitator for negotiating a settlement with DHCF that is superior to a similar settlement that Chartered itself negotiated when it was controlled by DCHSI (discussed in Section II.B., below). Because the Rehabilitator is acting within his authority and discretion by entering into a fair, reasonable and adequate settlement agreement with the District, DCHSI should not be permitted to interfere.

II. <u>DCHSI Misunderstands and Misstates Key Facts</u>

A. Contrary to DCHSI's Assertions, DHCF Vigorously Fought Liability

The crux of DCHSI's opposition is its argument that the Rehabilitator has accepted too little from the District in settlement of Chartered's claims against DHCF. In support, DCHSI

points primarily to a determination by the Department of Insurance, Securities and Banking ("DISB") that Chartered's Medicaid contract with the District was retrospectively rated. Thus, DCHSI contends that Chartered's claims against DHCF were not, in fact, disputable. This is not true.

It is true that, on November 27, 2012, DISB issued an Order adopting a limited scope financial examination report determining that Chartered's Medicaid contract was retrospectively rated. The immediate (and limited) effect of this Order was to permit Chartered to show a significant receivable for the claimed premium on its financial statements. (Without the Order, Chartered's claim for premium owed for more than 90 days could not be booked as a receivable at all).[1] DISB's Order, however, pertained solely to the treatment of Chartered's claim for accounting purposes, not to DHCF's ultimate liability to pay the claim.[2] DISB has no jurisdiction over or power to bind DHCF. In truth, DHCF fought Chartered's claims vigorously and rejected the notion that the contract is retrospectively rated.

B. DCHSI Misstates the Nature and Value of the Claims Against DHCF

DCHSI incorrectly asserts that "the extent of the District's contractual liability depends on the extent of Chartered's liabilities to providers . . . ." Opposition at 1. That assertion rests on the assumption that Chartered's contract was retrospectively rated – an assumption fiercely

[1] Even though, after DISB's determination, Chartered's claim against DHCF for unpaid premium could be booked as a receivable, statutory accounting principles required that the amount of the receivable be substantially discounted to reflect the uncertainty of collection.

[2] DCHSI attached a copy of the DISB Order as Exhibit 2 to its Opposition, but mistakenly attached a preliminary, unsigned copy of the Report on Limited Scope Examination of D.C. Chartered Health Plan, Inc. Notably, the final report states, in its Summary of Findings: "we believe that the determination of whether the Contract is a retrospectively rated contract in accordance with statutory accounting principles *is a very close question*." Report at 4 (emphasis added), available at http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/DC%20 Chartered% 20Report%20limited% 20scope%20final.pdf.

disputed by DHCF, as discussed above. In addition, there never was a contractual guaranty that even an actuarially sound capitation rate would be sufficient to satisfy all of Chartered's debts.

DCHSI also significantly inflates the estimated damages, claiming that the District may owe Chartered more than $98 million. *See* Opposition at 9. DCHSI's total, however, includes more than $30 million for disputed MedStar claims. That is incorrect. The MedStar dispute has now been resolved for approximately $8 million, and a settlement agreement will be presented to the Court shortly for its approval. Even assuming DCHSI's methodology were correct, the total damages therefore now would be $76 million, not $98 million. A $48 million settlement represents 63% of total damages using DCHSI's own stated methodology.

DCHSI erroneously asserts that the Court should wait to approve the settlement until after the August 31 claims bar date so all potential losses can be measured. *See* Opposition at 12. As a matter of law, this is incorrect because, again, DCHSI's position rests on a misunderstanding of the nature of the claim: DCHSI's contention assumes that Chartered's contract with the District is retrospectively rated, and DHCF vigorously disputed that conclusion. Even the outside examiner retained by DISB to evaluate Chartered's contract said that it was a "very close question." *See* fn. 2, *supra*. As a matter of fact, the Rehabilitator has been closely and constantly monitoring the provider claim process as the August 31 claim bar date approaches. The estimated total claims are on track with those projected at the time of settlement, and the Rehabilitator does not anticipate a material change by August 31. The Rehabilitator took the likely claim totals (including incurred but not reported claims) into account when evaluating the settlement and projected the degree to which providers would be made whole. Again, the settlement gives fair value to Chartered for the asserted and potential claims against the DHCF.

C. The Rehabilitator Zealously Prosecuted Claims that Chartered Itself Failed to Pursue Prior to Rehabilitation

The Rehabilitator, as detailed in prior reports and its initial motion, zealously prosecuted Chartered's claims against DHCF. It expanded the scope of existing claims and initiated new claims. Its actuarial firm, Towers Watson (formerly known as Towers Perrin), prepared a detailed report analyzing Chartered's largest claim. The Rehabilitator presented Chartered's claims to the Centers for Medicare & Medicaid Services ("CMS") to explain their merits. At all times, including before the Contract Appeals Board ("CAB") and during settlement negotiations with DHCF, the Rehabilitator vigorously prosecuted Chartered's claims.

DCHSI's criticisms of the Rehabilitator's settlement with the District ring especially hollow considering Chartered's own action's prior to entering rehabilitation on October 19, 2012. As set forth in greater detail in the Rehabilitator's opening brief, the Rehabilitator more than doubled the amount sought in Charter's initial, pre-rehabilitation claim and asserted two new claims against DHCF. All told, due to the Rehabilitator's efforts, the Rehabilitator asserted over $62 million in claims against DHCF on Chartered's behalf. The Rehabilitator then negotiated a settlement that nets approximately 80% of the estimated damages for pending claims and approximately 60% of an outside estimate of damages for all pending *and* potential claims even by DCHSI's own methodology when the MedStar disputed claim resolution is taken into account.

In contrast, in September 2011, in a separate matter, Chartered—then under DCHSI's direction—settled a claim against the District for actuarially unsound rates for only 50 cents on the dollar. *See* Appeal of D.C. Chartered Health Plan, Inc. Under Contract No. DCHC-2008-D-5052, CAB No. D-1405, Order of Judgment, Filing ID 39761415, available through http://app.

cab.dc.gov/WorkSite/Docket_Case_Number.asp.[3] Further, in its settlement, Chartered released the District, but received no release (or covenant not to sue) in return. *See id.* Here, on the other hand, DCHSI criticizes the Chartered/DHCF settlement because it lacks mutual releases.

In short, the Rehabilitator's fact investigation, actuarial analysis, identification of new claims and re-examination of pending claims contrast sharply with Chartered's own actions pre-receivership.[4]

III. The Settlement Here More Than Satisfies the Standards for Court Approval

A. The Touchstone for Assessing a Settlement is Whether it is Fair, Adequate and Reasonable, Not Whether a "Better Settlement Is Conceivable"

The question before the Court is whether Chartered's settlement with DHCF merits approval. The Rehabilitator previously set forth the standards for settlement approval for somewhat analogous class action settlements. In brief, courts should "assess whether the

[3] The Court may take judicial notice of matters of public record. *See Bostic v. Dist. of Columbia*, 906 A.2d 327, 332 (D.C. 2006) (observing that the court may take judicial notice of laws, statutes, and other matters of public record in reviewing grant of motion to dismiss).

[4] DCHSI also makes the curious argument that the Rehabilitator is "wasting Chartered's money by pursuing expensive litigation against DCHSI and its owner, Jeffrey Thompson, in a [separate action]." *See* Opposition at fn.1. DCHSI asserts that "[i]f the District pays its bills in full, the effect of the Rehabilitator's litigation would be to recover money (if any) from the defendants, only to repay that money to DCHSI as the return of Chartered's surplus capital to its shareholder." *Id.* DCHSI appears to misunderstand the Plan of Reorganization and its priority relative to other creditors of Chartered. Only if and after Chartered satisfies the Class 3 provider claims in full may any remaining assets go to the lower classes. DCHSI's shareholder claim falls in Class 9. Thus, there are five additional classes of creditors after the Class 3 providers—including substantial Class 4 tax liabilities—whose claims must be paid in full *before* anything goes to DCHSI. Indeed, one might argue that DCHSI and Thompson have wasted Chartered's assets by breaching their contractual and fiduciary duties and by opposing the Rehabilitator's efforts at every turn in this Court, the Court of Appeals, and the CAB. These proceedings would have been far less expensive and time-consuming if DCHSI had allowed the Rehabilitator to perform his duties without second-guessing and forcing him to justify his decisions every step of the way. The Rehabilitator acknowledges that DCHSI is within its rights to do so. But for DCHSI then to criticize the Rehabilitator for incurring the time and expense that DCHSI's actions make necessary is a hard sell.

proposed settlement is 'fair, reasonable, and adequate' in relation to the strength of the plaintiffs' case and in comparison with the likely recovery that plaintiffs would have received if the case had gone to trial." *Ball v. AMC Entm't, Inc.*, 315 F. Supp.2d 120, 125 (D.D.C. 2004). In so doing, courts should "consider the facts and circumstances of each case and exercise their discretion to determine whether approval is warranted, while recognizing that the discretion 'to reject a settlement is restrained by the principle of preference that encourages settlements.'" *Id.* (quoting *Pigford v. Glickman*, 185 F.R.D. 82, 98, 103 (D.D.C. 1999)). Courts need *not* determine "'whether a better settlement is conceivable.'" *Id.* at 129 (quoting *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 U.S. Dist. LEXIS 8931, 2000 WL 1737867 at *2 (D.D.C. Mar. 31, 2000)). It is because the art and science of evaluating a settlement is by its very nature imprecise that a trial court's ruling on the adequacy of a proposed compromise is given great deference. *See Thomas v. Albright,* 139 F.3d 227, 231-33 (D.C. Cir.), *cert. denied,* 525 U.S. 1016, 1033 (1998).

The facts and circumstances here warrant court approval. DCHSI's criticisms do not fairly appreciate the risks, resources and time involved in litigating the claims against DHCF to completion. Chartered could have litigated all of these claims and recovered nothing. Similarly, Chartered could have litigated and resolved its claims for only half of the disputed amount, as Chartered's former management did with its claims against DHCF in 2011. *See* Section II.C., *supra*.[5] Moreover, if the settlement is approved before the end of the District's fiscal year, Chartered and its healthcare providers will receive the settlement funds in 2013. The result is

[5] Recognizing the uncertainties inherent in claims of this nature, the Rehabilitator never booked the full amount of the claims against DHCF as a receivable on Chartered's financial statements. Rather, the receivable that was booked reflected approximately 67% of the total premium deemed owing for the asserted claims. Notably, the settlement here is for approximately 67% of both the pending claims that the Rehabilitator could actuarially support *and* the estimated damages from the final contract year.

that priority creditors will be paid sooner, and likely more, than if Chartered had continued to litigate these claims.

DCHSI's questions concerning the settlement mechanics (Opposition at 10) do not reflect on the agreement's substantive merits. The settlement structure does not disadvantage Chartered or its providers. Put simply, this is a $48 million settlement paid in two parts: $18 million is paid to Chartered and $30 million paid to Chartered's priority creditor providers directly by DHCF, all in accordance with the reorganization plan. Chartered receives credit for settlement amounts paid by the District directly to providers.

The Rehabilitator believes, based on the opinion of his professional team, that the settlement represents fair value for Chartered's claims against the District. Not only does it capture a sizable percentage of Chartered's stated claims, it also factors potential other claims into the settlement consideration. A settlement now avoids the risks, uncertainties and substantial costs of further, lengthy litigation.

B. DCHSI's Aspersions on the Agreement's Procedural Fairness Lack Merit

DCHSI renews its argument that the District reached an agreement *with itself*. *See* Opposition at 3, 17. DCHSI fails to acknowledge, however, that the Rehabilitator stands in Chartered's shoes and acts on its behalf. *See* October 19, 2012, Emergency Consent Order of Rehabilitation at 2; D.C. Official Code § 31-1312 (2001). DISB's Commissioner signed the settlement agreement, but he did so in his capacity as Rehabilitator. Further, there exists a strong (but rebuttable) presumption that public officials, "discharge their duties correctly, lawfully, and in good faith." *Beauregard v. Mabus*, 10-CV-1972 RLW, 2012 WL 4857788 at *4 (D.D.C. Oct. 15, 2012) (citation omitted). DCHSI offers nothing to rebut that presumption. In addition, the Rehabilitator was advised by independent, outside counsel and advisors including but not limited

to the Special Deputy to the Rehabilitator, Faegre Baker Daniels and Reed Smith, none of whom has any affiliation with the District, and all of whom are experienced professionals that this Court may presume have fulfilled their obligations with great care.

DCHSI's sole "evidence" of aligned interests are: (1) a settlement with consideration worth 80% of the pending claims' value and (2) a settlement at "an early stage of the proceedings" meant that the "District avoided having to produce DHCF Director Turnage for deposition even though Chartered previously had won a motion to compel his deposition." Opposition at 17. But a settlement for 80% of the value of pending claims is fair and adequate by any reasonable measure. And postponing Director Turnage's deposition until he could be questioned about all three of Chartered's CAB claims – not just one – represented a sound tactical decision by Chartered to conserve resources.

In short, DCHSI's theory that the Rehabilitator and DISB aligned their interests with DHCF's does not fit the facts. The Rehabilitator's broadening of the size and scope of Chartered's claims against the District belies DCHSI's theory, as does DISB's early and correct determination that whether Chartered's Medicaid contract with the District was retrospectively rated was "a very close question." Close questions call for reasonable settlements. That is precisely what we have here.

C. No "Mini-Trial" is Necessary Because DCHSI's Valuation Is Mistaken

DCHSI in effect asks the Court to conduct a mini-trial on the merits of its speculative inflation of Chartered's filed and unfiled CAB claims against DHCF. The Court should decline to do so, both because the case law on which DCHSI relies is outdated, and because the Court already has sufficient information to evaluate the settlement.

Citing decades-old bankruptcy cases from other jurisdictions, DCHSI argues that

"[w]here there is an insufficient factual record for a reviewing court to make an informed and independent judgment about a proposed settlement agreement, the proposed agreement should not be approved." Opposition at 12 (citing *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 434 (1968), *In re American Reserve Corp.*, 841 F.2d 159, 163 (7th Cir. 1987)). More recently, however, courts have observed that the cases DCHSI relies on "appear to be grounded in pre-Code decisions which reflect the encompassing administrative role of the bankruptcy court under the Bankruptcy Act of 1898." *See In re Telesphere Commc'ns, Inc.*, 179 B.R. 544, 551 (Bankr. N.D. Ill. 1994). *See also In re Robert Novak*, 383 B.R. 660, 667 (W.D. Mich. 2008).

The settlement here should be approved even if DCHSI were allowed to put it on trial. A brief survey of key arguments with respect to only one of the three claims against DHCF underscores their complex and highly technical nature that would have required a time-consuming and expensive battle of the experts to litigate. DCHSI criticizes the settlement of the Alliance Program claim, which was based on actuarially unsound rates paid by the District for Alliance members (*i.e.*, District residents who cannot afford health insurance but are ineligible for Medicaid) in contract year three (July 2010-July 2011). DCHSI's arguments as to the Alliance claim are without merit for the following reasons:

- While DCHSI argues that there should be no discount applied to the Alliance claim – a claim that DCHSI itself had not even pursued – the District contested its liability under that contract, arguing that the Alliance Program was a purely local, not federal program, and therefore not subject to the same regulatory obligations to pay actuarially sound capitation rates that governed contracts involving federal funds.

- The capitation rate for Alliance members in contract year three was materially less than for the other four years of the contract. Yet Chartered itself, prior to its rehabilitation, *never* sought to challenge the rate decrease and seek an equitable adjustment.

- Some of Chartered costs and losses simply were not recoverable. In its final contract year, Chartered received a significant rate hike and successfully carved out HIV medication costs

from its capitation rate. But that year, prior to rehabilitation, Chartered also began to incur substantial expenses that affected its ability to pay provider claims, including but not limited to the following: it engaged Infosys and ACS as consultants in connection with managing its claims system; it hired APS as case managers to manage complex cases; it hired Reed Smith to prosecute pharmacy claims and negotiate with MedStar; and it retained healthcare consultant Optimity Advisors. Collectively, these expenditures exceeded $10 million, contributed to Chartered's unsustainable financial condition, and represented funds that were not recoverable in any claim against the District.

CONCLUSION

Consistent with his statutory duty and informed by actuarial experts and experienced counsel, the Rehabilitator agreed that all of Chartered's claims outlined in the Preamble to the Settlement Agreement be resolved for $48 million, with Chartered and the District exchanging a release (of the District) and a covenant not to sue (of Chartered). The settlement is fair, reasonable and adequate. Nothing in DCHSI's opposition casts doubt on that. The Rehabilitator therefore respectfully requests that the Court approve the Settlement Agreement.

August 16, 2013

Respectfully submitted,

TROUTMAN SANDERS, LLP

/s/ Prashant K. Khetan
Prashant K. Khetan
Bar Number 477636
401 9th Street, NW Suite 1000
Washington, D.C. 20004
(202) 274-2950
(202) 274-2994 (facsimile)
prashant.khetan@troutmansanders.com

/s/ David K. Herzog
David K. Herzog (admitted *pro hac vice*)
Faegre Baker Daniels LLP
300 N. Meridian Street, Suite 2700
Indianapolis, Indiana 46204
(317) 237-1240
David.Herzog@faegrebd.com

Attorneys for the Rehabilitator and the
Special Deputy to the Rehabilitator

Certificate of Service

I hereby certify that on this 16th day of August, 2013, a copy of the foregoing *Reply Memorandum of Points and Authorities in Support of Order Approving the Settlement Agreement Between D.C. Chartered Health Plan, Inc. and the District of Columbia* was filed and served by email upon:

William P. White, Rehabilitator
c/o Stephanie Schmelz
DISB, Office of the General Counsel
810 First St., NE, Suite 701
Washington, D. C. 20002
Stephanie.Schmelz@dc.gov

Daniel Watkins
Special Deputy Rehabilitator
1050 K Street NW, Suite 400
Washington, DC 20001
danwatkins@sunflower.com

Charles T. Richardson
Faegre Baker Daniels LLP
1050 K Street NW, Suite 400
Washington, DC 20001
crichardson@faegredb.com

Stephane J. Latour
E. Louise R. Phillips
Assistant Attorney Generals
441 Fourth Street, NW, 630 South
Washington, D.C. 20001
Louise.Phillips@dc.gov
Stephane.Latour@dc.gov

David Killalea
Manatt, Phelps & Phillips, LLP
700 12th Street, NW Suite 1100
Washington, DC 20005-4075
dkillalea@manatt.com

J. Jonathan Schraub
Sands Anderson PC
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
JJSchraub@SandsAnderson.com

/s/ Prashant K. Khetan

Prashant K. Khetan