

Nos. 13-CV-348 and 13-CV-358

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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D.C. HEALTHCARE SYSTEMS, INC.,  
APPELLANT,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE, SECURITIES, AND  
BANKING  
&  
D.C. CHARTERED HEALTH PLAN, INC.,  
APPELLEES.

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ON APPEAL FROM A JUDGMENT OF THE  
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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**APPELLEES' OPPOSITION TO APPELLANT'S MOTION FOR AN IMMEDIATE STAY  
PENDING APPEAL**

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This case arises from efforts to rehabilitate a failing District of Columbia Medicaid health maintenance organization (“HMO”) with over 100,000 enrollees. The court-approved reorganization plan authorized the sale of some, but not all, of the HMO’s assets. The HMO’s parent company has appealed the plan and seeks a stay of the asset sale. Motion for an Immediate Stay Pending Appeal (“Mtn.”) 4.

The Court should deny a stay. First, the request is now moot. The asset sale closed on April 30. There is thus no longer a transaction to enjoin, and as practical matter the transfer of assets to the non-party purchaser cannot be undone. Second, the parent company failed to demonstrate—below or here—that it was entitled to stay. It has not shown that it is likely to succeed on its claims, that it will suffer irreparable harm, or that a stay is in the public interest. Its claim that the Superior Court violated its due process rights when approving the reorganization plan has no merit. Likewise,

the claim that the court-appointed rehabilitator engaged in an unlawful liquidation, rather than rehabilitation, of the HMO simply misunderstands the statutory rehabilitation process. Moreover, the parent company has not shown that the sale of some of the HMO's assets would or has caused the parent irreparable harm. Rather, the HMO's inability to place itself in a position to successfully bid on a new Medicaid contract prevented it from continuing as a Medicaid provider in its present form. Finally, the public interests favor ensuring an efficient transition to a new, eminently qualified entity to serve the more than 100,000 Medicaid enrollees, 5,000 plus healthcare providers, and 160 employees that the HMO is no longer able to serve, pay, and employ.

## **BACKGROUND**

### **1. The Relevant Actors.**

D.C. Chartered Health Plan, Inc. ("Chartered") is a licensed HMO that provides Medicaid coverage to over 100,000 District residents. D.C. Code § 31-3401 *et seq.* (2009 Repl.); Appendix ("App.") 2-3, 671. D.C. Healthcare Systems, Inc. ("DCHSI") is Chartered's sole owner. App. 3, 349. DCHSI, in turn, is wholly owned by Jeffrey E. Thompson. App. 3.

The Department of Health Care Finance ("DHCF") is the District agency responsible for administering the District's Medicaid Plan. D.C. Code § 7-771.01 *et seq.* (2008 Repl.). DHCF contracts with HMOs to provide Medicaid services in exchange for premium payments. *See* D.C. Code § 771.05(4). DHCF, with the Office of Contracting and Procurement ("OCP"), solicits bids and recommends Medicaid contract awardees to the Council of the District of Columbia. D.C. Code §§ 7-701.01 *et seq.* and 2-352.01 *et seq.* (2011 Repl.).

Chartered provided Medicaid services pursuant to a contract with DHCF. App. 3. Chartered's Medicaid contract was its sole source of revenue. App. 14,349. Chartered's contract expired on April 30, 2013. *See* App. 14, 376-77, 379.

As an HMO, Chartered is regulated by the District's Department of Insurance, Securities, and

Banking (“DISB”) and is subject to the provisions of, *inter alia*, D.C. Code § 31-3851.01 *et seq.* (2009 Repl.), which require HMOs to maintain certain “risk-based capital” (“RBC”) levels.

## 2. Chartered’s Risk-Based Capital.

DISB became concerned with Chartered’s RBC levels when it filed its statutorily required 2009 financial statement. D.C. Code § 31-3851.02(a); App. 511; *see also* App. 452-53. As a result, DISB increased its oversight of Chartered. App. 511. DISB’s concern continued after Chartered filed its 2010 financial statement. App. 511; *see also* App. 452-53.<sup>1</sup>

Chartered was due to file its 2011 annual report with DISB on March 1, 2012, but instead sought and received an extension of time from DISB. App. 511. Then, in April 2012, Chartered’s auditor resigned, and Mr. Thompson stepped down as Chairman of Chartered’s Board. App. 265, 272, 671, 903. On April 13, 2012, Chartered filed its unaudited 2011 financial report. App. 671. That report showed that: (1) Chartered sustained an operating loss of \$15 million in 2011; (2) its capital and surplus as of December 31, 2011, were just \$1.4 million; and (3) its RBC level was only 10.3%, significantly below the 200% required by D.C. Code § 31-3851.01 *et seq.* App. 671.

Pursuant to D.C. Code §§ 31-3851.01(12 & 13), and 31-3851.06, Chartered’s deficient RBC level triggered a Mandatory Control Level Event (“MCLE”), requiring DISB Commissioner William White to “take such action as is necessary to place the health organization under regulatory control” pursuant to D.C. Code § 31-1301 *et seq.*, which provides for the rehabilitation of an HMO provider. D.C. Code § 31-3851.06. The statute, however, permitted Commissioner White to forego action for

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<sup>1</sup> DCHSI’s suggestion (Mtn. 5) that these concerns and increased oversight did not arise until 2011 and are an “aberration,” is refuted by the record. App. 511; *see also* App. 452-53 (“Chartered was within the Company Action Level RBC at 160% and 152% as of December 31, 2010 and 2009, respectively.”), 847 (“These conditions are not new, nor are they unique to 2011, but rather the continuation of a trend that began in 2007 and have progressively eroded Chartered’s surplus position over the past five years. . . .”); 852 (“Since 2007, Chartered’s RBC Ratio has steadily declined . . . .”).

a period if there was an expectation that the MCLE might be eliminated. D.C. Code § 31-3851.06(c). In this case, DISB gave Chartered the opportunity to eliminate the MCLE. App. 671. In response, Chartered submitted plans for increasing its RBC on May 5 and 29. App. 671.

On June 6, Commissioner White and advisors Daniel Watkins and Faegre Baker Daniels LLP met with Chartered's CEO and Board of Directors to discuss its RBC plans. App. 672; *see also* App. 542-43. On June 29, Chartered informed DISB that DCHSI was engaged in discussions with persons interested in acquiring and recapitalizing Chartered. App. 672, 840; *see also* App. 265. DISB believed Chartered needed an infusion of at least \$30 million to remain viable. App. 15, 706.

Thereafter, on September 27, 2012, Chartered's new auditor provided DISB with an updated report about Chartered's 2011 financials. App. 672. This update revealed that Chartered's condition was worse than previously indicated. App. 672. Specifically, Chartered's 2011 year-end capital and surplus was at least \$3.7 million less than the \$1.4 million reported on April 13, placing Chartered in the red. App. 672. The audit also revealed questionable related-party transactions with DCHSI. *See* App. 672. The updated audit triggered the dismissal of Chartered's CFO and Controller. App. 672.

### **3. Chartered's, DCHSI's, and Mr. Thompson's Consent To Rehabilitation.**

Because (1) Chartered was unable to cure its RBC deficiency in the six months between April and October, (2) its financial condition was worse than previously understood, and (3) DHCF was threatening to terminate Chartered's Medicaid contract as a result of its financial condition, DISB determined to place Chartered under regulatory control pursuant to D.C. Code §§ 31-1310-3114. App. 376-77, 379, 672-73. D.C. Code § 31-1310 provides 12 bases for a rehabilitation order, including the insurer's consent to the proceeding. D.C. Code § 31-1310(12). In this case, Chartered's Board adopted a resolution on October 16 consenting to rehabilitation, and DCHSI and Mr. Thompson approved the Board's resolution on October 18. *See* App. 267, 510, 513, 672.

The next day, October 19, 2012, DISB filed a consent petition for a rehabilitation order in the

Superior Court. The court granted the petition that same day. App. 8. The rehabilitation order appointed Commissioner White as Chartered's Rehabilitator and vested him with the powers set forth in D.C. Code § 31-1301 *et seq.*, including the authority: (1) of Chartered's directors, officers and managers; (2) to take possession and control of Chartered's assets; (3) to take actions necessary to reform and revitalize Chartered; and (4) to appoint a Special Deputy having the Rehabilitator's powers and responsibilities. App. 8-9. In addition, the order vested title to all of Chartered's assets in the Rehabilitator "by operation of law." App. 9.

The order also required the Rehabilitator to file periodic accountings and to submit a rehabilitation plan for court approval. App. 10. It directed Chartered's representatives to cooperate with the Rehabilitator. App. 10. Finally, the court retained jurisdiction "for purposes of granting such other and further relief as this cause and the interests of the policyholders, creditors, or the public may require." App. 10.

Effective that same day, Commissioner White appointed Daniel Watkins Special Deputy. His written order was entered *nunc pro tunc* on November 2. App. 22-23, 673. In addition, Commissioner White retained Faegre Baker Daniels LLP as the Rehabilitator's counsel.

The Rehabilitator has a duty to protect the interests of more than just Chartered's equity shareholder. *See* D.C. Code § 31-1312(e). That duty of protection includes: (a) ensuring uninterrupted care for Chartered's enrollees; (b) enabling Chartered to continue processing claims and making payments to its 5,000 plus health-care providers and creditors; (c) protecting the interests of Chartered's approximately 160 employees; and (d) preserving whatever equity value there might be for the benefit of Chartered's shareholder, the paramount consideration being Chartered's enrollees. App. 13, 510-13, 514-15, 674.

**4. Rehabilitation Efforts Result In An Asset Purchase Agreement With AmeriHealth Mercy.**

**a. DHCF's request for proposals for the entire managed care program.**

Less than a week after entry of the rehabilitation order, on October 25, 2012, DHCF Director Wayne Turnage and Commissioner White testified before the Council about Chartered's receivership and DHCF's plans to rebid the *entire* managed care program. App. 375, 476-77, 509. At the time, three companies had Medicaid contracts with DHCF, Chartered's being the largest. App. 512.

During his testimony, Director Turnage indicated that DHCF intended to issue a request for proposals ("RFP") on October 30 to solicit new bidders for the managed care program, with bid responses due on November 30. App. 379. DHCF's goal was to recommend the award of new five-year contracts to three health plans by December 31, 2012, subject to the Council's approval, to ensure an orderly transition to the new contracts effective May 1, 2013. App. 379-80.

Director Turnage noted the challenge that this timeline posed to Chartered because DHCF would "not award a contract to any company while it is in receivership." App. 380; *accord* App. 477. In his view, "if Chartered [wa]s to compete for the next bid, this timeline essentially mean[t] that the company w[ould] either need to be sold or successfully exit receivership before the contract award date." App. 380; *accord* App. 14, 259, 271-72. Commissioner White also noted Chartered's challenges, observing that "[f]inding a qualified buyer and completing a purchase agreement within the timeline to allow Chartered to effectively compete for a new contract" would be difficult. App. 510. Nevertheless, he believed that "a sale and change of ownership, if feasible, [wa]s the best and safest outcome for everyone." App. 513. He explained that the Special Deputy would be charged with finding the best suitor. App. 514-15.

As anticipated, less than two weeks after the rehabilitation order was entered, on November 1, 2012, OCP issued a RFP seeking bids to provide healthcare services to the District's Medicaid-

eligible population. App. 579. Proposals were due on December 3. App. 477, 579.

As Director Turnage indicated, Chartered was not eligible for a contract award under the RFP while in receivership because section C.3.1 of the RFP required contract recipients to remain “in compliance with all DISB requirements concerning equity, capitalization, reserves, and insurance coverage throughout the term of the Contract.” App. 703; *see* App. 284-85.

**b. The Special Deputy’s search for an investor or buyer for Chartered.**

In late October 2012, in an effort to find a suitor that could recapitalize Chartered, the Rehabilitator engaged Keefe, Bruyette, & Woods, Inc. (“KBW”), an investment banking firm. App. 705; *see also* App. 13, 676-77. KBW immediately sought interested investors. App. 677, 705-13; *see* App. 477. KBW entered into discussions with 17 potential partners. App. 677, 710. Of those, 13 executed non-disclosure agreements and on November 9 received a process letter and a copy of Chartered’s unaudited 2011 financials. App. 13, 463-66, 677, 710. The letter requested responses by November 14. App. 463-66, 677, 710. Seven of the 13 potential investors responded. App. 677, 710.

“Several well capitalized strategic parties[, however,] declined to participate in the process given the financial and legal condition of Chartered and the compressed timeframe . . . .” App. 710. As noted, Chartered’s financial picture was incomplete because the audit of its 2011 financials was not finished. App. 14. Moreover, the unaudited financials showed practically no remaining capital. App. 14. Chartered also faced additional challenges, including: adverse publicity and speculation regarding the on-going investigation of Mr. Thompson; questions about related-party transactions; uncertainties surrounding an aged \$4 million federal income tax asset recorded on Chartered’s books, coupled with DCHSI’s failure to file consolidated tax returns that included Chartered for any period after April 30, 2010; and concerns that Chartered’s remaining assets were illiquid and of

uncertain value.<sup>2</sup> App. 15, 30-31, 272, 676, 709. Finally, on November 28, 2012, DHCF issued a Corrective Action Plan/Non-Compliance Letter to Chartered expressing concern about the quality and level of its services. App. 14, 675. This followed Director Turnage's October 25 testimony that DHCF was also establishing a corrective plan to address issues of inadequate staffing. App. 379.

The Special Deputy reviewed and evaluated the seven responses, considering each investor's financial strength, Medicaid expertise, ability to submit an RFP response, ability to finance and close a transaction, and likelihood of securing a new Medicaid contract. App. 677, 710. The Special Deputy indentified the three strongest candidates and opened discussions with them. App. 677, 710.

In the meantime, Chartered continued to prepare a RFP response, monitored the RFP process, and submitted clarifying questions. App. 477, 677-78. In addition, the Special Deputy requested that DHCF extend the RFP response deadline. App. 676. DHCF declined this request. App. 676.<sup>3</sup>

**c. The Special Deputy signs a letter of intent with AmeriHealth Mercy.**

Of the final three candidates, none was interested in purchasing Chartered outright; each offered only to acquire certain assets. App. 678. Thus, the Special Deputy decided that the best alternative for achieving value for Chartered was to enter into an agreement with AmeriHealth Mercy ("AHM") Health Plan for the purchase of some of Chartered's assets. App. 16, 477, 678, 715-22.

The Special Deputy selected AHM for several reasons. AHM is "one of the largest organizations of government-sponsored managed care and administrative services entities in the United States." App. 25. AHM was financially secure, had made the best offer, and had substantial

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<sup>2</sup> Chartered's largest potential asset is a contested claim against DHCF for tens of millions of dollars in unpaid premiums that is pending before the Contract Appeals Board ("CAB"). App. 676.

<sup>3</sup> DCHSI's assertion that the Rehabilitator could have, but did not, ask DHCF to extend the bid deadline (Mtn. 8) is refuted by the record. App. 676.

Medicaid experience and a record of success bidding for Medicaid contracts. App. 679. AHM also had the expertise and resources to participate with Chartered in finalizing a timely RFP response. App. 679. It was KBW's expert opinion that the transaction (a) would provide Chartered with reasonable value for its assets given its current condition and (b) was the best option. App. 17, 679.

On November 30 and December 1, 2012, the Special Deputy caused Chartered to enter into a letter of intent, clarifying letter, and letter agreement (collectively, the "Letter of Intent"). App. 468-70, 678, 715-22. The Letter of Intent contemplated that Chartered would sell some of its assets to AHM, including Chartered's existing Medicaid contract. App. 468-70, 678, 715-22. In exchange, AHM agreed to pay Chartered \$5 million. App. 468-70, 678, 715-22.

**d. AHM submits a Medicaid RFP response with Chartered's assistance.**

As the Letter of Intent was finalized, Chartered's and AHM's employees finalized a RFP response. App. 679-80. The Special Deputy determined that a bid submitted by, or jointly with, Chartered would not be received favorably, particularly because Chartered was not going to be financially qualified. App. 14, 16-17, 380, 679-80, 703. Instead, he determined that the best chance for achieving success, realizing value for Chartered's assets, and providing a non-disruptive transition for Chartered's enrollees, providers, and employees, was for AHM to submit the RFP. App. 477, 680. To this end, AHM submitted the RFP in its own name on December 3. App. 680.

The Special Deputy issued a statement that same day announcing his decision not to submit a response to the RFP on Chartered's behalf. App. 472-73, 680. The statement also noted that Chartered had signed a letter of intent with AHM for the sale of certain assets. App. 472-73, 680. DCHSI was aware of this announcement the day it was made. App. 228-29, 526.

**e. The Special Deputy negotiates an asset purchase agreement with AHM.**

After Chartered and AHM executed the Letter of Intent, the Special Deputy entered into negotiations with AHM for a definitive asset purchase agreement. App. 680. The result was an

agreement with the following key terms: (1) AHM would be at a level that would comply with the RBC requirements; (2) AHM would purchase certain assets from Chartered for \$5 million, including Chartered's name, other intellectual property, existing Medicaid contract, and provider agreements; (3) Chartered would retain certain assets, including its approximately \$60 million claim against DHCF for unpaid premiums, \$14 million in assets pledged to secure a DCHSI loan, and its claims against third parties, including Mr. Thompson. App. 78-227, 681-82.

Closing of the asset purchase agreement was conditioned upon several things, including: (1) court approval of the agreement and the Special Deputy's Plan of Reorganization for Chartered; (2) AHM being awarded a Medicaid contract pursuant to the RFP process; (3) DHCF's approval of the transfer of Chartered's existing Medicaid contract to AHM; and (4) AHM obtaining the necessary licenses to operate as an HMO in the District. App. 78-227, 681-82.

## **5. Subsequent Developments And Proceedings.**

### **a. DCHSI's bid protest.**

On December 17, 2012, DCHSI filed a bid protest with the CAB related to the Medicaid RFP. App. 517-33. The protest purported to challenge the Special Deputy's actions, specifically the decision not to submit an RFP on Chartered's behalf. App. 517-33. DCHSI alleged that the Special Deputy and the Rehabilitator's counsel were acting under conflicts of interest that resulted in collusive bidding and an illegal restraint of trade. App. 517-33.

The CAB dismissed the protest on February 27, 2013, for lack of jurisdiction and because DCHSI lacked standing. App. 579-84. The CAB found that "the protest, in fact, largely challenges the propriety of the conduct of the Rehabilitator, and its agents, and not that of the procuring agency—OCP on behalf of DHCF—that issued the Solicitation." App. 582. The CAB declined to impute the alleged anti-competitive behavior to the District as a whole because there was no evidence of ongoing communications or collusion between the involved agencies that could have

tainted the solicitation. App. 582. The CAB also concluded that DCHSI was not an “aggrieved person.” App. 583. DCHSI did not appeal the CAB’s decision.

**b. The Special Deputy’s First Status Report.**

The Special Deputy filed his first status report on January 11, 2013. App. 12-54. In addition to informing the court of his efforts to secure a buyer for Chartered, the Letter of Intent with AHM, and the submission of AHM’s RFP response, it advised that the audit of Chartered’s 2011 financials was complete. App. 17-19. The audit reflected that Chartered experienced a loss of \$9.4 million and ended the year with \$5.9 million in capital and surplus. App. 17, 33-34. While the final results were stronger than reported in April 2012, this was due to the inclusion of a net \$20 million retrospective premium receivable that had not been included as an asset in the unaudited financials. App. 17-18, 283. This addition reflected the auditor’s valuation of the \$60 million premium claim against DHCF. App. 18, 30. The auditor also determined that related-party balances of nearly \$4 million did not qualify as an asset and made other adjustments to the 2011 financials. App. 18-19.

**c. DCHSI’s “Notice of Appearance” in the Superior Court.**

Three days after the Special Deputy filed his first status report DCHSI filed a “Notice of Appearance” in the Superior Court on January 14, 2013. App. 922. In that notice, counsel appeared on behalf of DCHSI “in order to receive copies of all pleadings, documents and correspondence that are served and filed in this matter,” as DCHSI was not a party to the proceedings. Although aware for six weeks that the Special Deputy did not submit a RFP response on Chartered’s behalf and had entered into a letter of intent with AHM, DCHSI did not attempt to intervene to challenge the Special Deputy’s actions, or otherwise seek relief from the court. Sup. Ct. Civ. Pro. R. 24.

**d. The Special Deputy’s Second Status Report requesting approval of the asset purchase agreement and reorganization plan.**

On February 22, 2013, the Special Deputy filed his second status report and request for

expedited approval of Chartered's reorganization plan and the AHM asset purchase agreement. App. 55-68. Expedited consideration was needed because, at the time, closing on the asset purchase agreement had to occur before April 1, given the impending expiration of Chartered's contract and that court approval of the agreement was the first of several steps that had to be completed. App. 55, 243-44.

The Special Deputy provided the court with a complete copy of the asset purchase agreement, and his report outlined its key provisions. App. 58-61, 78-227. Further, the Special Deputy proposed a Plan of Reorganization for Chartered. App. 61-63. The plan included (1) closing on the asset purchase agreement with AHM; (2) transferring Chartered employees to AHM; and (3) continuing the Rehabilitation Order so that the Rehabilitator could wind down Chartered's remaining operations, marshal its assets, including pursuing claims against DHCF, and applying the marshaled assets to Chartered's outstanding liabilities. App. 61-63.

The Special Deputy also updated the court with Chartered's September 30 financials. App. 56, 74-75. Those revealed that Chartered had a pre-tax profit of \$700,000 for the first nine months of 2012, but that amount reflected a \$12 million receivable for retrospective premium payments that were being contested by DHCF. App. 56, 683. Absent this retrospective premium receivable, Chartered sustained almost \$11 million in losses. App. 56, 683. Chartered's books reflected capital and surplus of \$9 million, but this included \$32 million in contested premium payments and \$14 million in assets pledged to secure a DCHSI loan. App. 56, 683. In sum, Chartered was a company with an illiquid balance sheet and assets that were unavailable to pay claims. App. 258.<sup>4</sup>

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<sup>4</sup> DCHSI notes that the December 31, 2011, audited financial statement reported that Chartered met or exceeded the minimum net worth requirement at the end of 2011. Mtn. 12. The minimum net worth requirement is one imposed by the Medicaid contract and is different from RBC. App. 43. The December 2011 audit reflects that Chartered's RBC was 42%—at a MCLE level. App. 43.

DCHSI immediately filed a one and one-half page opposition to the request for expedited consideration of the Special Deputy's reorganization plan. App. 228-29, 253, 921. DCHSI asserted that there was no exigency because "the government" had the power to extend the Medicaid contracting deadlines. App. 229. DCHSI then requested that the court issue a briefing schedule so that it could oppose the Special Deputy's petition on its merits, followed by "a hearing." App. 229. DCHSI took no steps to intervene. Super. Ct. Civ. Pro. R. 24(c).

In response, appellees maintained that expedited consideration was required because of the DHCF's schedule for awarding the new Medicaid contracts and the need for a smooth transition for Chartered's 100,000 enrollees, 160 employees, and 5,000 providers. App. 233-34. Appellees noted, contrary to DCHSI's suggestion, that the Rehabilitator did not have the power to extend the Medicaid contracting deadlines imposed by DHCF. App. 234. And they pointed to the absence of any suggestion that DCHSI planned to (or could) recapitalize Chartered. App. 235, 237.

**e. March 1 hearing before Superior Court Judge Melvin R. Wright.**

On March 1, 2013, the parties and DCHSI appeared before Judge Melvin R. Wright on the Special Deputy's Second Status Report. App. 241. DCHSI raised numerous issues at the hearing.

First, DCHSI complained that Chartered's capital problems stemmed from the \$60 million in premium payments it was owed from DHCF. App. 247-49. With that money, it asserted that Chartered would have sufficient RBC. App. 248. Judge Wright, however, rejected this argument, observing that the disputed premium claims were speculative, and that Chartered was not capable of operating while it waited for the money. App. 248-49, 276; *see also* App. 258-59.

Second, DCHSI offered to demonstrate that its historic capital reserves had been deemed sufficient by DISB. App. 249-50, 286. Judge Wright found this irrelevant, observing that the issue was Chartered's current financial condition, not its past. App. 250-51.

Third, DCHSI complained that the Rehabilitator had not provided it with information. App.

263-64. When Judge Wright questioned why DCHSI did not “file a request of the [c]ourt to compel them to provide you with the information,” DCHSI said it made a “judgment call” not to. App. 268.

Fourth, DCHSI argued that the existing Medicaid contracts could be extended and the bidding on the new contract reopened. App. 255-56, 262, 269-70, 279-81. The Special Deputy reiterated that DHCF was not before the court; that he had no control over DHCF and the Medicaid contract solicitation process; and thus that it was not within his power to extend any pertinent deadlines. App. 257-58. Judge Wright also questioned his authority to order such relief. App. 269-70, 275. Furthermore, Judge Wright questioned how Chartered would “get a contract under any scenario” and wondered why DCHSI had not submitted “any affidavit that you have a prospective buyer.” App. 261, 283. DCHSI was not prepared to respond to those issues. App. 262, 283-84.

Fifth, DCHSI alleged that the Special Deputy had a conflict arising from Chartered’s former employment of his brother. App. 266. The Special Deputy advised the court that he had disclosed this information at the outset and the Office of the Attorney General had determined that there was no conflict of interest. App. 273. Judge Wright found no merit to DCHSI’s claim.

Finally, DCHSI argued that the Rehabilitator had engaged in an improper liquidation of the company and failed to obtain fair value for Chartered’s assets. App. 252-53, 262, 269. In doing so, DCHSI did not suggest what a fair value would have been. Judge Wright rejected these arguments, finding that the Rehabilitator had acted properly. App. 274-76.

At the conclusion of the March 1 hearing, Judge Wright approved the asset purchase agreement as part of his final order adopting the Rehabilitator’s plan of reorganization for Chartered. App. 275-77, 294-96. Judge Wright found that expedited consideration was appropriate and that the proposed contract and plan were fair under the totality of the circumstances. App. 275-76.

**f. DCHSI’s request for a stay and injunctive relief in the Superior Court.**

On March 6, DCHSI moved for a stay and other injunctive relief in the Superior Court. App.

298-339, 723-37. It asked the court to stay the March 1 order approving the purchase agreement and reorganization plan. App. 298. It also asked the court to enjoin the awarding of new Medicaid contracts and order the bidding reopened so that Chartered could compete for a contract. App. 298. For support, DCHSI argued that the Rehabilitator had taken improper steps to liquidate, rather than rehabilitate, Chartered. The Special Deputy opposed the motion. App. 669-98, 813-25. The Superior Court denied the request for a stay and injunctive relief on April 2. App. 914-18.

Applying the *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987), balancing test, Judge Wright concluded that DCHSI had not demonstrated a likelihood of success on its claims, that it would suffer irreparable harm, or that the public interest favored a stay. App. 915-18.

On the merits, Judge Wright rejected DCHSI's claim that the Special Deputy had undertaken an unlawful liquidation of Chartered. App. 915. He found that after the AHM asset purchase agreement was executed, Chartered would still retain substantial assets and its sizable claim against DHCF. App. 917-18. Likewise, he rejected DCHSI's argument that the Special Deputy had failed to obtain the requisite court approval for his actions, particularly his decision not to bid on a new Medicaid contract. App. 915-16. Instead, Judge Wright found that the Special Deputy had acted within his statutory authority. App. 915-16. Judge Wright also found that DCHSI's and Thompson's consent to the sale of assets was not required under the statute. App. 916. Finally, he concluded that he lacked authority to intervene in the Medicaid contract bidding process. App. 915-17.

As for irreparable harm, Judge Wright rejected DCHSI's claim, noting that the Special Deputy's decision not to bid on the Medicaid contract was not what threatened the existence of Chartered's business. App. 917. Instead, he found that "Chartered was set to lose its Medicaid contract once the current contract expires at the end of April 2013 because Chartered was unqualified to receive a new contract under the term of the Medicaid RFP issued in late 2012." App. 917.

Likewise, he noted that “the Rehabilitator is not charged with making up for the parent company’s lack of diversification in its business model.” App. 915.

Finally, he found that there was a countervailing interest—the “public interests in providing uninterrupted Medicaid coverage to Chartered’s current 100,000 enrollees . . . .” App. 918 n.2.

DCHSI filed timely notices of appeal from the Superior Court’s March 1 and April 2 orders. On April 15, 2013, DCHSI moved to consolidate and expedite the appeals. For support, DCHSI asserted that AHM would “assume control over Chartered on May 1, 2013.” Amended Motion to Expedite and Consolidate Related Appeals 2-3. Despite this knowledge, DCHSI waited until April 29, to seek a stay in this Court.

**g. Further developments.**

On March 27, 2013, DHCF announced its intent to award the new Medicaid contracts to AHM, Medstar Family Choice, and Thrive Health Plan. App. 829. AHM’s contract was approved as of April 18. On April 30, AHM closed on the asset purchase agreement with Chartered, finalizing the sale of some of Chartered’s assets to AHM. See attached declaration.

**DISCUSSION**

**I. DCHSI’s Request For A Stay Of The Order Approving The Asset Purchase Agreement Has Been Rendered Moot By The Closing Of The Sale Of Chartered’s Assets To AHM.**

DCHSI’s April 29 motion for a stay of Judge Wright’s order approving the asset purchase agreement between Chartered and AHM has been rendered moot by the completion of that sale on April 30. As anticipated by DCHSI in its April 15 motion to expedite, AHM was to assume control of the Chartered assets covered by the asset purchase agreement on May 1. AHM and Chartered closed on the agreement on April 30. The closing finalized the sale of those assets, transferring ownership and title from Chartered and the Rehabilitator to AHM, who is not a party to these proceedings. This sale has rendered DCHSI’s eleventh-hour request for a stay request moot.

“In general, when the issues presented are no longer ‘live’ or the parties lack a ‘legally cognizable interest in the outcome,’ a case is moot.” *Settlemyre v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 904-05 (D.C. 2006); *accord Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006). It is well-settled that if an event occurs while an appeal is pending which renders relief impossible or unnecessary, the matter at issue is moot. *Settlemyre*, 898 A.2d at 905. Thus, in deciding whether an issue is moot, the Court must determine whether it can fashion effective relief. *Smith v. Wells Fargo Bank*, 991 A.2d 20, 24 (D.C. 2010).

This Court has observed in cases involving real property that the sale of the property generally precludes effective appellate relief, except for an award of monetary damages. *Smith*, 991 A.2d at 25. This is because once the property has been sold to a third party and the defending party no longer has any right to possess it, it is not possible for the court to award the property to the plaintiff. *Id.*; *Thorn*, 912 A.2d at 1195 (citing *Lathrop v. Sakatani*, 141 P.3d 480, 486 (Haw. 2006) for the proposition that the “sale of the property prevents the appellate court from granting any effective relief.”); *Evans v. Family Sav. & Loan Ass’n of Va.*, 481 A.2d 1309, 1310 (D.C. 1984) (“Even if we were to reverse the order denying the injunction, neither this court nor the trial court could set aside the foreclosure sale because the purchaser is not a party to these proceedings. Consequently, the appeal is moot, because there is no way in which we can grant effective relief.”).

Here, the April 30 sale of some of Chartered’s assets to AHM, a non-party to these proceedings, has rendered DCHSI’s request that the sale be stayed moot. The *status quo* that DCHSI sought to maintain has been irrevocably altered by completion of the sale. Moreover, at this juncture, it is not possible for the Court to order AHM to return the assets to Chartered. The circumstances here present a “classic case” of a moot request for appellate relief, as the requested remedy is not available. *Thorn*, 912 A.2d at 1196; *accord Volk v. Volk*, 2013 WL 1580247, \*3 (Ohio

App. Apr. 3, 2013) (“We concur with appellees that the closing on the asset sale rendered the current appeal moot.” (footnote omitted).). Thus, DCHSI’s request for a stay should be denied.

The fact that the sale closed after DCHSI filed its motion for a stay in this Court is of no moment. A familiar equitable principle is that “equity aids the vigilant rather than those who slumber on their rights.” *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392, 403 (1991). Here, DCHSI sat on its rights throughout the proceedings.

DCHSI was aware on December 3, 2012, that the Special Deputy (a) had not submitted a bid on Chartered’s behalf for a new Medicaid contract and (b) planned to enter into a transaction with AHM; yet DCHSI took no action in the Superior Court. App. 228-29, 526. Thereafter, the Special Deputy made clear his intent to sell some of Chartered’s assets to AHM in his January 11, status report. App. 16-17. Upon learning this, DCHSI did not move to intervene or otherwise seek relief, but instead merely notified the court that it wished to receive copies of future filings. *See* App. 922.

The Special Deputy then provided the trial court and DCHSI with a copy of the asset purchase agreement in conjunction with his second status report and plan for rehabilitation, filed on February 22. App. 55-227, 922. In response, DCHSI filed a short opposition to the request for expedited consideration of the agreement and plan that same day and appeared a week later at the March 1 hearing to object to the proceedings on this limited ground. App. 228, 246.

After Judge Wright denied the stay on April 2, DCHSI took no action until April 15. Then, while well aware that the transaction was scheduled to close and that AHM was to assume control of Chartered’s assets on May 1, DCHSI did not ask this Court to stay the trial court’s order, but merely requested expedited consideration of its appeals. It was not until April 29, the day before the sale’s closing and two days before AHM was to assume control of Chartered’s assets and employees, that DCHSI sought a stay from this Court. That DCHSI’s request came too late is attributable to nothing

other than its lack of diligence. *See Mills v. Alta Vista Ranch, LLC*, 187 P.3d 627, 631 (Mont. 2008) (“We have warned against the particular danger of dismissal for mootness where the sale of property to a third party is involved. In such circumstances, we have recognized that there is a special need for seeking a stay” (internal quotation marks and citation omitted).).

**II. The Court Should Deny DCHSI’s Request For The Additional Reasons That DCHSI Has Not Demonstrated A Likelihood Of Success On The Merits, Irreparable Harm, Or That The Public Interest Favors A Stay.**

“To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors granting of a stay.” *Akassy v. William Penn Apartments, Ltd. P’ship*, 891 A.2d 291, 309 (D.C. 2006) (quoting *Barry*, 529 A.2d at 320-21.). “A stay pending appeal is always an extraordinary remedy, and it is no less so when extraordinary jurisdiction must be asserted as a prerequisite.” *Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. v. National Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966). Here, DCHSI has failed demonstrate a likelihood of success on the merits, that it would suffer irreparable injury if the stay is not granted, or that it is in the public’s interest to issue a stay.

**A. DCHSI has failed to demonstrate that it is likely to succeed on the merits of its two claims.**

DCHSI contends that it is likely to succeed on two claims: (1) it was denied procedural due process in the trial court and (2) the Rehabilitator undertook an unlawful liquidation, rather than rehabilitation, of Chartered. DCHSI’s contentions are without merit.

1. DCHSI’s due process claim is without merit.

“The procedural due process requirement is flexible and calls for such procedural protections as the particular situation demands, varying according to the nature of the interest that is at issue.” *Jordan v. Jordan*, 14 A.3d 1136, 1159 (D.C. 2011) (internal quotation marks omitted). In assessing

what process is due, the Court balances (1) the private interests affected; (2) the risk of error created by the chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *Id.*

Here, DCHSI contends its rights were violated because it was “never afforded due process to contest the Rehabilitator’s proposed plan.” Mtn. 19. Other than an “opportunity to object to the proposed plan,” DCHSI fails to identify what process it contends was constitutionally mandated but denied. Likewise, DCHSI cites no precedent indicating that it is entitled to relief. Mtn. 18-19. To the contrary, the record demonstrates that DCHSI received all the process it was due.

Having expressly consented to Chartered’s rehabilitation, DCHSI was aware of the rehabilitation proceedings in the Superior Court. App. 267, 510, 513, 672. Likewise, having been served with the Rehabilitator’s second status report, DCHSI received notice of his proposed plan, including his request for expedited approval of his plan to sell some of Chartered’s assets to AHM. App. 67. That same day, DCHSI filed a response to the Rehabilitator’s requests, objecting to expedited consideration of the plan and offering a limited response on the merits. App. 228-29, 921.

A week later, DCHSI appeared at the March 1 hearing on the Rehabilitator’s motions. Although complaining that the Rehabilitator had not provided it with information regarding his reorganization efforts sooner, DCHSI conceded that it was aware of those efforts but did not seek court intervention based its own judgment. App. 267-69. Judge Wright considered and rejected DCHSI’s sundry additional complaints about the rehabilitation plan and found that expedited consideration and approval of the plan were warranted by the existing exigencies. App. 240-97. Thereafter, DCHSI filed a motion and supporting documentation, even including a lengthy declaration from a putative expert, requesting a stay of the March 1 order and other injunctive relief. App. 298-668, 723-812. Judge Wright accepted those filings and considered those materials, but

concluded that they did not warrant the relief sought. App. 914-19. The record thus demonstrates that DCHSI was given ample “opportunity” to contest the plan; no more process was due.

2. DCHSI’s challenges to the Rehabilitator’s actions are without merit.

District law and the rehabilitation order granted the Rehabilitator broad “[a]uthority to take possession and control of Chartered’s assets and administer them under the general supervision of the Court.” App. 9; D.C. Code § 31-1311(a). The rehabilitation order transferred title of those assets to the Rehabilitator, and authorized him “to take such action as deemed necessary or appropriate to reform and revitalize Chartered.”<sup>5</sup> App. 9; *see also* D.C. Code § 31-1312(c). This included the “authority to make judgments and take actions he believe[d] to be in the public interest.” *Ky. Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 587-88 (Ky. 1995).

DCHSI mistakenly contends that the Rehabilitator exceeded the scope of this authority by “liquidating” rather than rehabilitating Chartered. In actuality, Rehabilitator acted within his statutory authority when negotiating and executing the transaction with AHM and recommending the Plan of Reorganization. Given the significant challenges he faced, the Special Deputy achieved the best outcome possible under the circumstances: a rehabilitation that resulted in the continuation of Chartered’s business by a newly formed company.

DCHSI simply ignores the fact that rehabilitation plans may take a variety of forms, including transferring the insurance business to another entity:

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<sup>5</sup> Given DCHSI’s consent to the petition for rehabilitation and the subsequent transfer of *title and control* of Charter’s assets to the Rehabilitator, DCHSI’s consent to the sale of Charter’s assets was not required. Mtn. 3-4, 9, 13. Indeed, DCHSI’s suggestion that its consent to any plan of reorganization is required reveals a fundamental misunderstanding of insurance rehabilitations. Mtn. 4. By its logic, DCHSI maintains that an insurer with a parent company and comparable articles could thwart any State’s insurance regulatory regime by simply refusing to agree to the Rehabilitator’s plan. This proposition is wholly at odds with the purposes of insurance-provider rehabilitation, the statutory scheme, and the authority vested in the Rehabilitator.

In general, the rehabilitation statutes place upon the conservator the responsibility of devising a plan for rehabilitation that will result in the successful continuation of the business of the insurer. Such plans may result in (1) the continuation of the business by the identical insurer, or by a new insurer to be formed to assume the assets of the old insurer, or (2) the execution of a trust indenture which will establish an orderly mechanism for the presentation and enforcement of . . . claims against the insurer.

Couch on Insurance (3d Ed.) § 5:24 (Rehabilitation Plans, generally); *see also Koken v. Fid. Mut. Life Ins. Co.*, 907 A.2d 1149, 1156 (Pa. Commw. Ct. 2006) (approving a rehabilitation plan that contemplated the possible sale of FML's insurance business to an assuming insurer for cash, after which FML would eventually be dissolved); *In re Rehabilitation of Am. Investors Assurance Co.*, 521 P.2d 560, 561-63 (Utah 1974) (affirming the rehabilitator's plan to transfer the insurer's assets to a new company, despite shareholder's objections that the practical effect of the plan was to liquidate the company and nullify the shareholder's equity interest).

Here, the Rehabilitator agreed to a sale of Chartered's assets only after concluding that a recapitalization or sale of the company was not possible. Given Chartered's financial and legal circumstances, the Rehabilitator had to take action to avoid leaving Chartered in an unsalvageable position upon the expiration of its existing Medicaid contract. Because Chartered's financial condition made it impossible for the company to successfully bid on a new Medicaid contract and continue to operate independently, the Rehabilitator acted properly in negotiating a transaction that served the best interests of Chartered's enrollees, providers, employees, and shareholder.

DCHSI's contention that the Rehabilitator had to seek a liquidation order to achieve the results here is simply wrong. The plan that the Rehabilitator devised for Chartered is one that transforms Chartered within the meaning of D.C. Code § 31-1312(c) ("If the rehabilitator determines that . . . other transformation of the insurer is appropriate, the rehabilitator shall prepare a plan to effect the changes."). Had Chartered not been able to team with a qualified partner, Chartered almost certainly would have been liquidated upon the expiration of its existing contract. As it is,

however, Chartered will continue to exist, in a substantially different form, for however long it is financially able to do so. Indeed, Chartered will retain two assets of potentially substantial value: its claims against DHCF for approximately \$60 million in retrospective premiums and \$14 million in assets that have been pledged to secure a DCHSI loan. The Plan of Reorganization effects a legitimate rehabilitation by revitalizing and transferring Chartered's Medicaid business to a new entity, and leaves those assets that were salvageable (because the Medicaid contract with the District and the employees need to perform it were not). Thus, while the plan transforms Chartered, it does not liquidate it.

**B. DCHSI has failed to demonstrate that the execution of the asset purchase agreement and reorganization plan will it cause irreparable harm.**

DCHSI contends that absent a stay, the Rehabilitator will "destroy Chartered's business." Mtn. 4, 15. This assertion fundamentally mischaracterizes what happened here. As Judge Wright correctly found, through no fault of the Rehabilitator, "Chartered was set to lose its Medicaid contract once the current contract expires at the end of April 2013 because Chartered was unqualified to receive a new contract under the terms of the Medicaid RFP issued in late 2012." App. 917. While DCHSI contends that the Rehabilitator should have submitted a bid on Chartered's behalf despite that fact, to buy Chartered more time, DCHSI points to no evidence that Chartered's RBC levels could have been cured in time for Chartered to be awarded a new Medicaid contract. DCHSI and Mr. Thompson were given six months to find an investor or buyer for Chartered and they failed. There is no indication that Chartered's financial situation could have been rectified on any schedule that might conceivably have enabled the company to continue on as the District's largest HMO given the condition that Chartered was *and remains* in.

Moreover, to the extent DCHSI contends that \$5 million was not adequate consideration for all the assets that Chartered sold or that Chartered's remaining assets have somehow been devalued

as a result of the AHM transaction (Mtn. 15-16), DCHSI alleges monetary harm, not irreparable injury. Of course, it is well-settled that “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough” to demonstrate irreparable harm. *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

**C. DCHSI has not demonstrated that the public interests favor a stay.**

The public interests at stake here—the need to provide uninterrupted Medicaid coverage for Chartered’s more than 100,000 enrollees, timely payment to Chartered’s more than 5,000 health-care providers, continued employment of Chartered’s approximately 160 employees, and completion of the process to rebid the District’s entire managed care system—are self-evident and paramount. DCHSI maintains, however, that these interests will not suffer because Chartered’s enrollees, health-care providers, and employees “would continue to receive care, be employed and be paid for services rendered,” if the Court stays the reorganization plan. Mtn. 17-18. DCHSI does not explain how this can possibly be so. Upon the expiration of Chartered’s Medicaid contract on April 30 (which would not be impacted by the stay DCHSI seeks here), Chartered stopped receiving premium payments from DHCF for the ongoing care of its enrollees and, as has been established, Chartered has insufficient capital to continue providing Medicaid services while it waits for a ruling on its premium claims against DHCF. Thus, a stay would harm the public interests.

**CONCLUSION**

DCHSI’s motion for an immediate stay pending appeal should be denied.

Respectfully submitted,

IRVIN B. NATHAN  
Attorney General for the District of Columbia

DONNA M. MURASKY  
Deputy Solicitor General

A handwritten signature in black ink, appearing to read "Stacy L. Anderson", written over a horizontal line.

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May 2013

## CERTIFICATE OF SERVICE

I certify that on May 6, 2013, this opposition was served by first-class mail, postage prepaid,  
and email to:

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Stacy L. Anderson

Nos. 13-CV-348 & 13-CV-358

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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D.C. HEALTHCARE SYSTEMS, INC.,  
APPELLANT,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF  
INSURANCE, SECURITIES, AND BANKING,  
&  
D.C. CHARTERED HEALTHPLAN, INC.  
APPELLEES.

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ON APPEAL FROM AN ORDER OF THE  
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

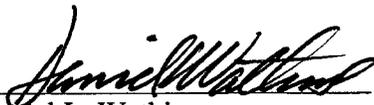
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**DECLARATION OF DANIEL L. WATKINS**

I, Daniel L. Watkins, declare under penalty of perjury that the following facts are true:

1. I am over the age of eighteen, and I have personal knowledge of, and am competent to testify to, the facts stated in this Declaration.
2. On October 19, 2012, I was appointed by the Commissioner of the District of Columbia Department of Insurance, Securities and Banking, William P. White, as Special Deputy to the Rehabilitator overseeing the rehabilitation of DC Chartered Health Plan, Inc. ("Chartered") pursuant to Emergency Consent Order of Rehabilitation entered in *District of Columbia v. DC Chartered Health Plan, Inc.*, C.A. No. 2012-8227 (D.C. Superior Court, Judge Melvin R. Wright) and Chapter 13 of Title 31 of the D.C. Official Code.
3. On March 1, 2013, the Court entered an order approving the Asset Purchase Agreement ("Agreement") between Chartered and AmeriHealth District of Columbia, Inc. ("AmeriHealth").
4. On April 30, 2013, Chartered and AmeriHealth closed the Agreement.

Dated: May 3, 2013



Daniel L. Watkins

Special Deputy to the Rehabilitator for DC Chartered Health Plan, Inc.