Nos. 13-CV-348, 13-CV-358 & 13-CV-1059

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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

V.

DISTRICT OF COLUMBIA DEPARTMENT
OF INSURANCE, SECURITIES, AND BANKING,

&

D.C. CHARTERED HEALTH PLAN, INC.,
APPELLEES.

ON APPEALS FROM ORDERS OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH CARE FINANCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

IRVIN B. NATHAN
Attorney General for the District of Columbia

ARIEL B. LEVINSON-WALDMAN
Senior Counsel to the Attorney General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-66235
Richard.Love@dc.gov

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STATEMENT OF INTEREST AND OVERVIEW

Through the District of Columbia Department of Health Care Finance ("DHCF"), it is the statutory responsibility of the District of Columbia's executive branch to: "[d]evelop a comprehensive, efficient, and cost-effective health-care system for the District's uninsured, under-insured, and low income residents" and to "[m]aximize the well-being and quality of life for eligible low-income individuals and other populations through the provision of leadership and direction in administering responsive, effective, and efficient health-care benefits." D.C. Code § 7-771.03 (2012 Repl.).

DHCF submits this amicus brief pursuant to D.C. App. R. 29(a) to defend a settlement agreement that was entered in the interest of DHCF's mission for the District's most vulnerable residents, and in the public interest. The District entered the settlement on DHCF's behalf with D.C. Chartered Health Plan, Inc. ("Chartered"), which acted through a Rehabilitator who, after Chartered suffered near catastrophic financial instability, was appointed pursuant to statute with the prior consent of Chartered's board of directors. Chartered is a licensed health maintenance organization that provided Medicaid coverage to over 100,000 of the District's poorest residents, including children, seniors, and people with disabilities, under a contract with DHCF. These District residents depended upon Chartered and its network of health care providers to obtain vital services.

Appellant D.C. Healthcare Systems, Inc. ("DCHSI"), the parent corporation of Chartered, seeks to overturn the settlement, impugning it as the product of collusion and conspiracy based on unsupported allegations. As this brief and the brief submitted by

Chartered as appellee show, the settlement was the result of a fair process, and in particular arm's-length bargaining between experienced counsel. It was a reasonable compromise of a complex set of disputes. For Chartered, the settlement provided favorable, prompt, and certain resolution of claims it held against DHCF. For the low-income Medicaid population that Chartered served, the settlement mitigated the extraordinary risks of destabilization of their health care provider network. Chartered owed hundreds of health care providers for medical services they delivered to many of the District's most vulnerable residents and its continued delay in payment to those providers threatened discontinuation of needed medical services to District residents. DCHSI provides nothing to overcome the presumption of regularity accorded to the actions of government actors like DHCF.

Overturning the settlement would be contrary to the public interest even assuming that the Court had a way effectively to do so at this point—which, due in part to DCHSI's failure to seek a stay of the trial court's order approving the disbursement of funds pursuant to the settlement, it does not. The Superior Court's order approving the settlement agreement was well within its discretion and should be promptly affirmed.

ARGUMENT

I. The Trial Court Properly Deferred To The Rehabilitator's Exercise Of His Statutorily Conferred Discretion In Entering A Settlement On Behalf of Chartered, And This Court In Turn Should Defer To The Trial Court's Exercise Of Its Discretion In Approving The Settlement.

The judgment of Chartered's Rehabilitator here should receive two levels of deference: the one that the Superior Court properly accorded the Rehabilitator, and, second, the one this Court should accord the Superior Court.

First, the Superior Court appropriately accorded deference to the Rehabilitator's judgment of what was in Chartered's best interests. In order to protect the public, the Council of the District of Columbia established a process for the rehabilitation of insurers whose operation puts at risk the welfare of those being insured. The Commissioner of the Department of Insurance, Securities, and Banking ("Commissioner") "may apply by petition to the Superior Court of the District of Columbia for an order authorizing him or her to rehabilitate a domestic insurer" when the "insurer is in such a condition that the further transaction of business would be hazardous financially to its policyholders, creditors, or the public." D.C. Code § 31-1310(1). Only the Commissioner may commence such a proceeding. D.C. Code § 31-1303(a). "An order to rehabilitate the business of a domestic insurer . . . shall appoint the Commissioner . . . the rehabilitator; and shall direct the rehabilitator forthwith to take possession of the assets of the insurer, and to administer them under the general supervision of the court." D.C. Code § 31-1311(a). "The rehabilitator may take such action as deemed necessary or appropriate to reform and revitalize the insurer" and "shall have all the powers of the directors, officers,

and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator." D.C. Code § 31-1312(c). The rehabilitator has exclusive standing to settle pending claims on behalf of the company. D.C. Code § 31-1313(a) ("The rehabilitator shall take any action respecting the pending litigation deemed necessary in the interests of, justice and for the protection of creditors, policyholders, and the public."). Through these provisions, the Council plainly intended to afford the Rehabilitator here discretion to take actions he thought appropriate to rehabilitate Chartered after its well-documented, grave financial problems.

Numerous jurisdictions with rehabilitation statutes similar to the District's have held that "the decision of a Rehabilitator to rehabilitate the insolvent business of an insurer is within the sound discretion of the rehabilitator and should not be rejected by the reviewing court unless the Rehabilitator has abused that discretion." *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1092 (Pa. 1992) (citing, among other cases, *Kueckelhan v. Fed. Old Line Ins. Co.*, 444 P.2d 667 (1968)). "[T]his great deference in favor of the Insurance Commissioner [when acting as a rehabilitator] and the resulting narrow scope of review for the courts are in recognition of the expertise of the administrative agency or individual officer assigned the task of regulating a given industry." *Id.* at 1093. Thus, "the trial court in its supervisory and reviewing role may not substitute its judgment for that of the Commissioner" but "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*, 444 P.2d at 674; *see Foster*, 614 A.2d at 1093

("[G]reat deference in favor of the Insurance Commissioner and the resulting narrow scope of review for the courts are in recognition of the expertise of the administrative agency or individual officer assigned the task of regulating a given industry."); *In re Mills v. Fla. Asset Fin. Corp.*, 818 N.Y.S. 2d 333, 334 (App. Div. 2006) ("The courts will . . . disapprove the rehabilitator's actions only when they are shown to be arbitrary, capricious or an abuse of discretion . . . ."); *Ky. Cent. Life Ins. Co. v. Stephens*, 898 S.W.2d 83, 86 (Ky. 1995) ("[T]he decision of the rehabilitator should not be rejected by the reviewing court unless the rehabilitator has abused [his] discretion.").

Second, the trial court's own exercise of discretion in deciding whether to approve a settlement is due deference by this Court. As this Court has held in similar circumstances, considering the standard of review of a trial court's approval of a settlement agreement under a "*parens patriae* statute or in the analogous context of class actions," review is "limited." *Shepherd Park Citizens Ass'n v. Gen. Cinema Beverages of Wash., D.C., Inc.*, 584 A.2d 20, 22 (D.C. 1990) (alterations omitted). "Appellants must show that the trial court abused its discretion: this generally requires a showing either that the agreement in question was so manifestly unfair as to preclude judicial approval, or that the court did not have sufficient facts before it to make an informed judgment." *Id.* "Great weight is accorded the trial judge's views because he is exposed to the litigants, and their strategies, positions, and proofs." *Id.*; *see In re Holly Marine Towing, Inc.*, 669 F.3d 796, 799 (7th Cir. 2012) ("We will not disturb a bankruptcy court's approval of a settlement unless such approval constituted an abuse of discretion. This standard is highly deferential since the bankruptcy court is in the best position to consider the

reasonableness of a particular settlement." (citation omitted)); *see also Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999) (noting "the principle of preference that encourages settlements").

II. The Superior Court Acted Well Within Its Discretion In Approving The Settlement Between Chartered And DHCF, Which Was Reached Through A Fair Process—Not A Collusive One, As DCHSI Asserts—And Embodies A Fair and Just Result.

The trial court recognized that it was to determine under the relevant facts and circumstances of this case whether the settlement between Chartered and the District was "fair, adequate and reasonable." Supplemental Appendix ("Supp. App.") 317; *accord Shepherd Park*, 584 A.2d at 23. In making this determination, the trial court further recognized, its task "is to consider [whether] there's arm['s]-length bargaining, whether there's an opinion offered by experienced counsel" and "what the terms of the settlement are in relationship to the strength of the case, as well as the status of the litigation at the time of the settlement." Supp. App. 317. Especially given the deference the trial court was to give the Rehabilitator, the trial court did not abuse its discretion in concluding that the settlement was fair—both in the process that culminated in the settlement agreement, and in the terms of the agreement itself, particularly in light of the strong public interest served by the settlement's terms.

A. The process of settlement and settlement approval was fair.

The process that culminated in the settlement had the classic trappings of fairness: the parties agreed in advance to the roles each would play; the bargaining was at arm's

length; and the trial court before issuing a judgment permitted all those who had expressed an interest to fully present their positions.

1. Chartered agreed to rehabilitation and in particular agreed to having its claims against the District of Columbia being pressed or settled by a District official charged with rehabilitation.

Chartered operated in a highly regulated field and was subject to statutory rehabilitation by the Commissioner if it experienced significant financial problems, as it undisputedly did. D.C. Code §§ 31-1310, 31-1311(a), 31-1315. On October 19, 2012, the DISB Commissioner filed an emergency consent petition for an order of rehabilitation for Chartered. Appendix ("App.") 1-7. The petition asserted that rehabilitation was necessary "to assure continuous and uninterrupted medical and payment coverage" to Chartered's clients. App. 2. The trial court granted the consent order for rehabilitation the same day it was filed, appointing the DISB Commissioner to be the Rehabilitator, as required by D.C. Code § 31-1311. App. 8. The order also required that the Rehabilitator "seek Court approval of any compromise or settlement of Chartered's claim pending before the District of Columbia's Contract Appeals Board [("CAB")] and the contemplated claim regarding capitation rates." App. 9. As the trial court observed, "Chartered consented in the initial filing to the Rehabilitator taking over and acting as a Board of Directors would have." Supp. App. 316; *see also* Supp. App. 325 ("Chartered consented through its Board of Directors to [cede] all control[] and decision making to the Rehabilitator.").

Chartered thus knew (or should be charged with having known) that the court-appointed Rehabilitator would be the Commissioner. *See Watson v. Scheve*, 424 A.2d

1089, 1092 (D.C. 1980) ("[A]ppellant is charged with knowledge of the laws . . . ."). Thus, its consent to an order of rehabilitation was tantamount to consent to negotiations between the Commissioner, as Rehabilitator, and DHCF to the extent the Rehabilitator sought to continue pursuing claims Chartered had brought or contemplated bringing against District entities. With Chartered's consent, the Rehabilitator, with particular statutory powers and duties to the rehabilitation, stood in its shoes for all purposes, including pressing Chartered's claims against DHCF. Thus, it was with Chartered's consent—while Chartered was controlled by DCHSI—that the Commissioner, as Rehabilitator, and DHCF were parties to the negotiation, each with its own separate statutory mandate and role.

2. The bargaining process was arm's-length.

Although District-affiliated actors were on both sides of the bargaining table, it is critical to recognize that they had different—and to some extent opposing—statutory mandates. In fealty to these mandates, the parties engaged in true bargaining before entering into the settlement agreement.

As the Rehabilitator indicated in moving for approval of the settlement, the discussions between his "professional team and DHCF and its counsel concerning the claims and their possible settlement have been vigorous, often contentious, and at all times arm's length." Supp. App. 47. The settlement agreement "is the product of extensive, arm's-length (and frankly, hard-fought) negotiations among experienced counsel, informed by actuarial experts"—including outside counsel from a private firm for the Rehabilitator. Supp. App. 51. "Counsel for the parties engaged in multiple

telephone conferences, in-person meetings, and rigorous and adversarial efforts to draft a settlement agreement that strikes a fair compromise of a difficult and complex set of disputes." Supp. App. 51. The Rehabilitator emphasized that experienced advocates on both sides participated "throughout months of analysis and negotiation." Supp. App. 51.

In determining whether the settlement was fair, adequate and reasonable, the trial court considered, among other matters, whether there was arm's-length bargaining and it was satisfied that the Rehabilitator and his team did not abuse their discretion and that their actions were "more than satisfactory." Supp. App. 317-18. Particularly in light of the "[g]reat weight" that "is accorded the trial judge's views because he is exposed to the litigants, and their strategies, positions, and proofs," *Shepherd Park*, 584 A.2d at 22, that fact-intensive conclusion should not be second-guessed on appeal.

3. The trial court approved the settlement after allowing DCHSI to air its position fully.

The trial court had sufficient facts to make an informed judgment. The court indicated that it had permitted DCHSI to participate because it "assisted the court in deciding whether or not [the Rehabilitator was] acting in an appropriate manner" and that it had "reviewed the numerous documents that [had] been presented," including DCHSI's opposition to the motion to approve the settlement. Supp. App. 317-18. The opposition—more than a hundred pages including attachments—included a comprehensive report from its putative expert, Drew A. Joyce, challenging the Rehabilitator's methodology for valuing Chartered's claims and his settlement position. Supp. App. 120-35. The trial court thus allowed DCHSI, despite its failure to intervene,

to state its position, although the court disagreed with that position on the merits. Supp. App. 318-19.

B. The substance of the settlement was fair.

Approval of the settlement was also fair as a matter of substance, not even *approaching* the level of "manifest[] unfair[ness]" that might justify this Court's overturning what the Rehabilitator and the Superior Court in the exercise of their respective duties agreed was an appropriate settlement. *Shepherd Park*, 586 A.2d at 22. The Superior Court recognized that its "role in the rehabilitation process is to supervise the Rehabilitator and to review the actions for abusive indiscretion." Supp. App. 317. It found that the Rehabilitator was "granted by statute, the right to make the decisions that [he] made," and it was "satisfied" that he had not abused his discretion in "negotiating this settlement on behalf of Chartered with the District of Columbia." Supp. App. 318, 341. "The settlement will resolve all claims between Chartered and the District of Columbia and result in" health care providers who filed timely undisputed claims "receiving 80 percent of what is owed." Supp. App. 318. Again properly deferring to the Rehabilitator's discretion, the trial court properly exercised its own discretion.

1. Under the settlement, Chartered received 80 percent of the asserted value of filed claims that were uncertain and subject to lengthy and costly litigation.

After the Rehabilitator assumed his statutory duties, he made claims for Chartered beyond what Chartered had made itself before rehabilitation began. In moving for approval of the settlement, the parties noted that the Rehabilitator had "revised the scope and amount" of Chartered's pre-rehabilitation CAB claim:

> increasing the total sought to be recovered from $25.8 million to over $51 million. In addition, the Rehabilitator submitted claims regarding a dental program change ($2.2 million), and regarding rates associated with the Alliance Program's non-Medicaid enrollees ($9 million). The Rehabilitator also considered other potential claims against DHCF, including claims related to rates during the last year of Chartered's contract with DHCF (May 2012-April 2013).

Supp. App. 44-45. The settlement agreement resolved all of these asserted and potential claims for $48 million—that is, an immediate payment of about 80 cents for every dollar Chartered had claimed was due (after the Rehabilitator's addition of new claims). Supp. App. 28 ¶ 2. The Rehabilitator was well within his discretion to conclude that a settlement at this level was appropriate.

The settlement provides for payments in two parts. First, the District agreed to make an $18 million payment to Chartered immediately upon the court's approval, through a technical adjustment that the District sought from the Centers for Medicare & Medicaid Services ("CMS") under federal Medicaid regulations. Supp. App. 28 ¶ 3A. The $18 million was to be distributed to Chartered's health care providers having timely undisputed payment claims. Supp. App. 28 ¶ 3A. Second, because only a percentage of each provider's undisputed claims would be paid through this $18 million distribution, the District agreed to an additional $30 million payment intended to cover most of the balance of the undisputed claims. Supp. App. 28 ¶ 3B. This amount was to be paid "either (a) directly to Chartered's providers in the Medicaid and Alliance program having undisputed Class 3 claims allowed by the Rehabilitator; or (b) if necessary to prevent the lapsing of Fiscal Year 2013 funds" to a third party selected by the District that would "make the payments to providers on the District's behalf." Supp. App. 28 ¶ 3B.

As described in the parties' motion for approval of the settlement, its "objective is to pay a total of $48 million in satisfaction of Chartered's claims against the District, paying those monies to the Class 3 priority creditors (healthcare providers) with undisputed claims filed on or before the August 31, 2013 bar date." Supp. App. 48. The parties noted that Chartered's health care providers had "been hurt the most by the suspension of claim payments since mid-April 2013" and that a "settlement now avoids the risks, uncertainties, and substantial costs of litigation measured in years, not months." Supp. App. 49.

DCHSI nonetheless opposed approval of the settlement agreement, arguing, as it does on appeal, that anything less than full payment was unreasonable and that the Rehabilitator accepted too little from the District in settlement of Chartered's claims against DHCF. Supp. App. 96-198. For example, DCHSI argued that Chartered's right to retrospective compensation is indisputable based upon DISB's November 27, 2012 determination that its contract with DHCF was retrospectively rated—that its actuarial assumptions could be revisited after the fact to determine whether Chartered had received appropriate compensation. Supp. App. 101-02.

DCHSI's position that the Rehabilitator could settle for no less than 100 cents on the dollar should be soundly rejected for two related reasons. First, any settlement will involve some compromise of a claim; even the strongest of claims are subject to a discount for the time value of money and the avoidance of the uncertainties and costs of litigation. *See In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007). And here, this particular litigation threatened to be expensive, requiring substantial

attorney time and the compensation of actuarial and other experts. It also threatened to be lengthy, with matters in the Contract Appeals Board often taking years and being subject to judicial review even after a final agency decision.

Second, in this case, there were demonstrable risks to Chartered's position. Notably, the November 27, 2012 determination on which Chartered relied was the result of an accounting opinion sometimes referred to as the Rector Report, which "pertained solely to the treatment of Chartered's claim for accounting purposes, not to DHCF's ultimate liability to pay the claim." Supp. App. 209. Moreover, the Rector Report stated that this was a "very close question" and that the sole purpose of the report was to inform Chartered on how to properly complete its financial statements. Supp. App. 209, 301. "DHCF fought Chartered's claims vigorously and rejected the notion that the contract is retrospectively rated." Supp. App. 209. Furthermore, even if the contract was retrospectively rated, it did not have a mechanism for calculating a specific amount due to Chartered. Supp. App. 209-10. Reasonable actuaries can and do disagree about the resolution of complicated matters like these. *See NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 469 (Iowa 2010) ("Actuarial science is a discipline that assesses risk in the insurance industry based upon the application of mathematical and statistical methods. It is not an exact science. . . . Just because two actuaries determine different premium rates by analyzing the same set of data does not mean the premiums were not determined on an actuarially sound basis by both actuaries.").

"DCHSI's criticisms do not fairly appreciate the risks, resources and time involved in litigating the claims against DHCF to completion" and the fact that it "could

have litigated all of these claims and recovered nothing." Supp. App. 213. In approving the settlement the court considered "what the terms of the settlement are in relationship to the strength of the case." Supp. App. 317. It noted that it had reviewed DCHSI's opposition and did not find it "to be persuasive." Supp. App. 318. "There can be criticism of any settlement and the evaluation of every claim can always lead one to say that you could have gotten more." Supp. App. 318. But after considering DCHSI's objections, the court "just [did] not agree with [its] calculations." Supp. App. 318-19; *see also* Supp. App. 327 (indicating in response to DCHSI's argument that the settlement was too low: "Well, I don't think you have demonstrated [that], so I don't agree with that"). "[I]n every case . . . there's compromise and it has to be weighed and I find that the Rehabilitator has done that in this case." Supp. App. 318. "The settlement will resolve all claims between Chartered and the District of Columbia and result in the Class Three claims receiving 80 percent of what is owed." Supp. App. 318. By any reasonable measure, a settlement in these circumstances for 80 percent of the value of pending claims was fair.

2. Although DHCF could have chosen to continue to litigate Chartered's claims, it agreed to the settlement because doing so was in the public interest.

DCHSI's brief to this Court portrays Chartered's litigation against DHCF as an inevitable march toward payment of Chartered's full demand—a *fait accompli*. That is incorrect. As discussed, litigation was in fact uncertain and, though the litigation never proceeded to the point when DHCF was forced to document as much, it had reasonable

defenses to Chartered's claims that it could have presented, based on its own analysis of the actuarial evidence.

Separate and apart from a litigation risk assessment, DHCF, consistent with its mandate, had a compelling public-interest reason to settle so that through the settlement agreement there would be an appropriate vehicle to efficiently direct funds through Chartered and immediately then to the providers to stabilize the provider market and eliminate a threat that vital services would be interrupted. As of April 19, 2013, Chartered had suspended payments to its health care providers, a fact well-documented in the record, *see* Second Supplemental Appendix ("2d Supp. App.") 7, in other litigation dockets of which this Court can take judicial notice, *see Salazar v. District of Columbia*, No. 93-452 (D.D.C.) Doc. 1847-1 at 1, and in public commentary at the time leading up to the settlement, *see, e.g.*, Mike Debonis, *Chartered could owe D.C. health providers $85 million*, Wash. Post, Apr. 19, 2013, *available at* 2013 WLNR 9609276 ("Chartered receiver Daniel L. Watkins said Friday that the company was suspending payment to care providers effective immediately while he gathers all outstanding claims and marshals the company's assets. He declined to give a timeframe for when providers can expect payment."); Ben Fisher, *Chartered could leave up to $70 million in unpaid medical bills*, Wash. Bus. J., Apr. 19, 2013, *available at* 2013 WLNR 9641260.

The Rehabilitator set August 31, 2013, as the deadline for Chartered's providers to submit claims for unpaid services, which as of June 3, 2013, totaled $45.7 million. *Salazar* Doc. 1847-1 at 41. Ultimately, Chartered's providers filed over $60 million in claims with the Rehabilitator. Supp. App. 53; 2d Supp. App. 8. The $48 million

settlement paid approximately 80 percent of Chartered's filed CAB claims and 60 percent of the Rehabilitator's estimate of the upper limit of all potential damages. Supp. App. 49.

Critical to DHCF and to the Mayor, the settlement allowed Chartered to pay its health care providers most of the amounts owed to them reasonably promptly, which ensured that health care services to the District's most vulnerable residents continued uninterrupted and that the network of Medicaid providers remained viable. The trial court expressly recognized the significance of this resolution, observing that "[t]he settlement will resolve all claims between Chartered and the District of Columbia and result in the [providers] receiving 80 percent of what is owed." Supp. App. 318. Protracted litigation would not only lead to risk and uncertainty directly for the parties, but also hurt those who could least afford it, Chartered's providers and the District residents they served—those residents whose access to quality health care is at the core of DHCF's statutory mission.

Avoiding the destabilization of the provider market was central to the District's interest in the settlement. Upon reaching an agreement in principle, Mayor Vincent Gray announced that it "paves the way to reimburse hospitals and the array of community based providers for the costs incurred in delivering health care services to more than 105,000 Medicaid and Alliance beneficiaries who were assigned to the DC Chartered Health Plan." DHCF, Press Release of June 27, 2013, *available at* http://dhcf.dc.gov/release/mayor-vincent-c-gray-announces-plan-pay-unpaid-health-care-provider-claims. Upon the court's approval of the settlement agreement, DHCF Director Wayne Turnage announced that it "sends a clear message to our providers that they are not only important

to the beneficiaries they serve, but that they are considered an integral part in the system that contributes to the health and well-being of the District's most vulnerable population." DHCF, Press Release of Aug. 21, 2013, *available at* http://dhcf.dc.gov/release/judge-approves-settlement-chartered-health's-unpaid-claims; *see also Salazar* Doc. 1847 (DHCF's July 22, 2013 Status Report discussing the importance of timely payments to the provider community and agency's focus on this issue); *Salazar* Doc. 1832 (plaintiffs' June 21, 2013 motion for a status conference to address issues caused by Chartered's failure to pay providers, including the potential effect on the access to, and continuity of, care for children receiving Medicaid services). The settlement provided funds to pay Chartered's providers, who had been waiting months for payment, and ensured that vital health care services would continue uninterrupted.

Consistent with this advancement of the public interest, the settlement agreement's terms calling for the District to pay Chartered $18 million to be distributed to its providers was contingent not only on the Superior Court's approval, but also on federal authorization by CMS, whose approval was required to make the $18 million technical adjustment to Chartered's managed care rates. Supp. App. 31 ¶ 5. On August 16, CMS, which funds much of the District's Medicaid program, approved the technical adjustment. DHCF, Press Release of Aug. 26, 2013, *available at* http://dhcf.dc.gov/release/dhcf-receives-federal-approval-18-million-technical-adjustment-its-managed-care-rates. This approval further reinforces the conclusion that this settlement is in the public interest and that the public interest—not the supposed invincibility of Chartered's claims—was why DHCF wanted to settle rather than continue litigating.

C. DCHSI's claims of collusion are unsupported and false, and do not overcome the presumption of regularity.

With inflammatory language but no support whatsoever, DCHSI argues that the rehabilitation proceedings were a pretext for the District and the Mayor, supposedly controlling both sides of the settlement, "to bring about the end of Chartered and to irreparably harm" it. DCHSI Br. 39. This claim relies upon speculation, not evidence, and overlooks Chartered's consent to the order of rehabilitation and the differing statutory responsibilities of the Rehabilitator and DHCF once rehabilitation began. The presumption of regularity attaches to actions of these government officials and is not overcome by mere speculation. DCHSI, however, does not come close to providing the affirmative evidence that would be necessary to support its claims of collusion in these circumstances. To the contrary, the record evidence demonstrates that the Rehabilitator acted independently of the Mayor in pursuing his overriding obligation to rehabilitate Chartered.

As explained, Chartered knew at the time it consented to the order of rehabilitation that the Commissioner would, as required by statute, be appointed as the Rehabilitator. And it knew that the Commissioner, as Rehabilitator, would face DHCF in any negotiation to resolve Chartered's claims against the District. It should not now be heard to complain about "the District's position on both sides" of the settlement. DCHSI Br. 38.

In any event, regardless of Chartered's consent, the Rehabilitator has statutory responsibilities different from those of the DISB Commissioner and DHCF. The DISB

Commissioner is a regulator, generally responsible for ensuring that all laws "relating to insurance or insurance companies . . . and others doing insurance business in the District are faithfully executed." D.C. Code § 31-202(a). The Commissioner as Rehabilitator is not a regulator; instead he is directed to take "possession of the assets of the insurer," assume the "powers of the directors, officers, and managers," and act as he deems "necessary or appropriate to reform and revitalize the insurer." D.C. Code §§ 31-1311(a), 31-1312(c); *see also DiNallo v. DiNapoli*, 877 N.E. 2d 643, 644 (N.Y. 2007) ("The Superintendent of Insurance serves in two distinct capacities: (1) as supervisor and regulator of New York State's insurance industry as a whole . . . ; and (2) as a court-appointed receiver on behalf of distressed insurers"). The Rehabilitator, stepping into Chartered's shoes, had a narrow interest in maximizing recovery; DHCF, in contrast, is a separate agency acting here as a government regulator responsible for developing "a comprehensive, efficient, and cost-effective health-care system for the District's uninsured, under-insured, and low income residents." D.C. Code §§ 7-771.02, 771-03(2). The settlement, in which Chartered was paid $48 million, *i.e.*, 80 cents on the dollar for its claims, while allowing DHCF a means to stabilize the provider market in support of the public interest and its broader statutory mandate, appropriately reflected the distinct interests of the negotiating parties to the agreement.

With respect to the DHCF's assessment of the provider market and its conclusion that the stabilizing effect of the settlement disbursements were in the public interest, that executive-branch policy judgment should not be disturbed by this Court. "'Where no evidence indicating otherwise is produced, the presumption of regularity supports the

official acts of public officers, and courts presume that public officials have properly discharged their official duties.'" *Abdulshakur v. District of Columbia*, 589 A.2d 1258, 1265 (D.C. 1991) (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)). The presumption of regularity serves important purposes, including promoting the proper separation of powers. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that the presumption of regularity flows from the assignment of authority to the executive branch to execute the laws); *Latif v. Obama*, 677 F.3d 1175, 1181-82 (D.C. Cir. 2012) ("When the detainee's challenge is to the evidence-gathering process itself, should a presumption of regularity apply to the official government document that results? We think the answer is yes."). At root, it stands for the principle that courts should not overturn executive-branch actions without a solid basis for doing so.

Especially given Chartered's consent, the differing statutory responsibilities of the Rehabilitator on the one hand and DHCF on the other, and the presumption of regularity, the Court should reject DCHSI's bald claim of collusion. DCHSI provides no evidence for its collusion claim, which is instead belied by the record evidence. The Rehabilitator revised the scope and amount of Chartered's pre-rehabilitation CAB claim, increasing the total sought to be recovered from $25.8 million to $51 million. In addition, the Rehabilitator raised two new claims, a dental claim seeking $2.2 million and a claim regarding rates for non-Medicaid enrollees seeking $9 million. Moreover, as the record before the Superior Court reflected, this settlement stood in contrast to that negotiated by Chartered under DCHSI's control in a pre-rehabilitation matter where it settled a claim

against the District for alleged actuarially unsound rates for only 50 cents on the dollar. Supp. App. 211.

And though DCHSI here complains that the settlement was unfair because it "provides non-parallel releases," DCHSI Br. 47, in its 2011 pre-rehabilitation settlement, Chartered when controlled by DCHSI released the District but received no release or covenant not to sue in return. Supp. App. 212. Furthermore, the terms of the settlement were clear and DCHSI submits no authority or other evidence to infer something nefarious from the allegedly asymmetrical releases. It is entirely legitimate for the District to have reserved its right to sue Chartered for "any criminal or other intentional misconduct occurring prior" to the order of rehabilitation, "for submission of any false claims in violation of federal or District law," or "for taxes," Supp. App. 32 ¶ 9, particularly since as of 2013, it was known to DHCF and indeed the public that Chartered's former principal shareholder Jeffrey Thompson was under federal criminal investigation, as the Court can judicially notice. *See* Mike DeBonis, *Jeffrey Thompson Investigation is Far From Over,* Wash. Post, Sept. 26, 2012, *available at* http://www.washingtonpost.com/blogs/mike-debonis/post/jeffrey-thompson-investigation-is-far-from-over/2012/09/26/48926d64-0821-11e2-afff-d6c7f20a83bf_blog.html.

For all these reasons, DCHSI's conclusory assertion that the "District's doubly dominant roles . . . mock any suggestion of an arms-length negotiation," DCHSI Br. 37, is simply unsupported and should be rejected. Instead, the Court should give credence and deference to the Superior Court's finding that the Rehabilitator did not abuse his discretion and that his actions and those of his team were "more than satisfactory." Supp.

App. 318. As the Rehabilitator explained, the settlement agreement "is the product of extensive, arm's-length (and frankly, hard-fought) negotiations among experienced counsel, informed by actuarial experts" and the resulting settlement, which facilitated payment of most of Chartered's health care providers' claims, 80 percent of Chartered's filed CAB claims and 60 percent of Chartered's estimate of potential but unfiled claims against the District, bears that out. Supp. App. 51.

III. Overturning The Settlement Would Be Contrary To The Public Interest And Impossible As A Practical Matter.

Notably, after the trial court approved the settlement, DCHSI did not seek to stay its order, and the millions of dollars in disbursements to the providers called for by the Court and CMS-approved settlement have as of this point occurred months ago. 2d Supp. App. 47. It would not be possible to recoup millions of dollars from hundreds of health care providers without unknown but clearly negative fiscal and public effects, effects that undermine the public interest in market stability that motivated the District's entry into the settlement in the first place. Unwinding the settlement would threaten to *again* destabilize the provider market that allows District residents access to vital health care services, a prospect that is particularly unwarranted where the party that is now before this Court demanding reversal did not seek a stay of the Superior Court order approving this fair and appropriate settlement. Practical and equitable concerns thus reinforce the conclusion on the merits that the Superior Court's judgment should remain undisturbed.

CONCLUSION

The Superior Court's order approving the settlement between the District and Chartered should be affirmed.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

ARIEL B. LEVINSON-WALDMAN
Senior Counsel to the Attorney General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-6635

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CERTIFICATE OF SERVICE

I certify that on March 14, 2014, this brief was served by first-class mail, postage prepaid, to:

J. Jonathan Schraud
Danny M. Howell
Sands Anderson, PC
1497 Chain Bridge Road, Suite 202
McLean, VA 22101

David K. Herzog
Jon Laramore
Faegre Baker Daniels LLP
300 N. Meridian St. Suite 2700
Indianapolis, ID 46204

Prashant K. Khetan
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004

Loren L. AliKhan
Stacy L. Anderson
Office of the Solicitor General
Office of the Attorney General
441 4th Street, N.W., Suite 600S
Washington, D.C. 20001

RICHARD S. LOVE