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No. 70208-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHARTER PRIVATE BANK, f/k/a CHARTER BANK, a Washington
state-chartered bank,

Respondent,

v.

JOSEPH J. SACOTTE, individually and the marital community of
JOSEPH J. SACOTTE and MIDORI SACOTTE; JOEL J. LAVIN and
JANE DOE LAVIN; and FIRST CHURCH, LLC, a Washington limited
liability company

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE MARIANE SPEARMAN

BRIEF OF APPELLANTS SACOTTE

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I. INTRODUCTION

A court-appointed receiver may not favor one party in a receivership over another. The receiver here - Kevin Hanchett of Resource Transition Consultants ("RTC") - did exactly this. For instance, in the middle of the receivership, when Charter Bank and First Church, LLC and its members were clearly adversaries, RTC's website stated that Charter Bank was a "Client" and officers of the Bank were "References."

That Hanchett favored Charter Bank at the expense of First Church and its members became clear when he entered into a one-sided settlement with the Bank on behalf of First Church. In the settlement, Hanchett agreed to have First Church give up a meritorious claim for \$1,500,000 - \$3,000,000 against the Bank in exchange for the Bank (1) paying the nominal amount of \$10,000 (which all went to Hanchett) and (2) foregoing a \$900,000 claim the Bank had previously released. If Hanchett had truly been a neutral and disinterested receiver, he would never have agreed to a settlement that freed the Bank from answering to a seven figure claim and guaranteed that First Church and its creditors would not recover one cent in the receivership.

The settlement had to be approved by the trial court, which required the court to determine if the settlement was "fair and equitable."

To persuade the court to follow his recommendations, Hanchett represented he “had no dog in this fight.” The trial court accepted this representation despite clear signs to the contrary and gave substantial deference to the arguments put forward by Hanchett and the Bank.

The trial court also made findings on critical facts where the record was limited, the fact-finding process had just begun, and the evidence was in substantial dispute. Further, the court ignored factors that “must” be considered in determining whether the settlement was fair and equitable. Finally, even if the trial court believed, on the limited record before it, that First Church’s claims had little merit, the claim still had “some probability of ultimate success” and First Church should not have been forced to settle for literally nothing.

Because there is not “a sufficient factual foundation” to establish that the one-sided agreement was “fair and equitable,” this Court should reverse the trial court’s decision to approve the proposed settlement.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of September 23, 2011, authorizing settlement and compromise of claim.

2. The trial court erred in entering the order of October 6, 2011, dismissing First Church's counterclaims.

3. The trial court erred in entering the October 14, 2011 Order, denying Sacotte's motion for reconsideration.

4. The trial court erred in entering the March 15, 2013 Order on motion to abandon property, discharge general receiver and terminate case.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by making findings on critical facts where the fact-finding process had just begun, the record was limited, and the evidence was in substantial dispute and by ignoring factors that "must" be considered in determining whether a proposed agreement is fair and equitable? (Assignments of Error 1 - 4).

2. Did the trial court err by deferring to Hanchett's assertions regarding the one-sided settlement agreement that he negotiated with Charter Bank and by failing to require Hanchett to make certain disclosures in light of clear evidence that Hanchett had close ties to the Bank and was not acting as a neutral and disinterested receiver? (Assignments of Error 1 - 4).

III. STATEMENT OF THE CASE

A. Overview Of Events Prior To April 21, 2010

First Church owned the property in the Capitol Hill section of Seattle known as the First Church of Christ Scientists [CP 640]. As can be seen from the two photographs below [CP 619] - of the atrium (which is now part of the building's common area) and the building's exterior [CP 640] - the Church was truly a unique and special property. In 2007, First Church obtained a construction loan from Charter Bank so that it could convert the Church into twelve luxury townhomes (the "Project"). United Commercial Bank owned 67.5965% of the loan [CP 640, 675].





The development had great promise but, as frequently occurs on a complicated project, difficulties arose. In the trial court, Charter Bank asserted all of these difficulties were the fault of First Church but this is not correct. For instance, in 2009, when the Project was nearly complete, United Commercial Bank failed and was taken over by the FDIC [CP 401, 640]; as a result, Charter Bank did not disburse loan proceeds to First Church for approximately six months [CP 401-02]. Because First Church could not pay the cost of constructing the Project without these loan proceeds, construction ground to a halt, liens were recorded, and the overall cost of the Project increased significantly [CP 402, 640].

B. In The April 21, 2010 “Workout Agreement,” The Parties Agreed To Put Their Differences Aside So That The Project Could Be Completed, The Bank Repaid, And First Church Make An Expected Profit Of \$1,500,000 - \$3,000,000

In April, 2010, Charter Bank and First Church and its members, Joseph Sacotte and Joel Lavin, signed the “Loan Workout and Forbearance Agreement” (the “Workout Agreement”) [CP 640, 645 - 656]. Under the Workout Agreement, the parties agreed to put their differences aside so that the Project could be completed and the townhomes sold [CP 620]. A workout made good sense because the project was “98% complete” [CP 660] and many potential purchasers had expressed interest in the unique project [CP 640]. If Charter Bank had not breached the Workout Agreement, construction would have been completed, the townhomes sold, Charter Bank’s Note paid in full, and First Church’s profits likely been between \$1,500,000 and \$3,000,000¹ [CP 640-41, 668, 670].

The critical provisions of the Workout Agreement are set forth below.

¹ After this action was filed, Sacotte retained William Partin as an expert witness [CP 642]. Mr. Partin, a highly regarded expert [CP 717 - 731], was expected to testify in support of First Church’s claims against Charter Bank [CP 626].

1. The \$1,150,000 Pledged By Sacotte Would Be Used To Fund Completion Of The Project

Joseph Sacotte and his wife had pledged \$1,150,000 of their personal funds to Charter Bank as security for the construction loan (the “Pledged Funds”) [CP 640]. In the Workout Agreement, Par. 5 [CP 648], the Sacottes agreed that this \$1,150,000 would be used to pay the cost of completing the Project and selling the townhomes [CP 640, 648]. The Sacottes agreed to do this because construction was 98% complete and they knew the townhomes would sell quickly when they were completed [CP 640]. As events were to ultimately prove, the townhomes did sell quickly, and at reasonable prices [CP 1383].

2. The Bank Agreed To Fully And Finally Release All Claims That Arose Prior To April 21, 2010, Including The Bank’s Claim For Diversion Of Loan Funds

Prior to signing the Workout Agreement on April 21, 2010, Charter Bank had alleged that First Church and its members wrongfully diverted loan proceeds [CP 636, 643, 780]. These accusations were not true; nevertheless, for obvious reasons, First Church and its members wanted Charter Bank to release all such claims [CP 636, 780]. After long and arduous negotiations [CP 636], Charter Bank agreed to fully and finally release all claims - known or unknown - that arose before April 21, 2010 [CP 636, 780]. Paragraph 9.1(ii) of the Workout Agreement (the

“Release”) [CP 653] provides in relevant part:

The Bank hereby irrevocably and unconditionally forever releases, remises, acquits each of the Borrower/Guarantor/Pledger Parties, jointly and severally, and their respective agents, representatives, employees, members, officers, relatives, successors and assigns, from any and all claims and/or causes of action that the Bank has or may have, whether known or unknown, which directly or indirectly, could be or could have been asserted against them or any of them by reason of any default under the Loan Documents, implied contract claims and tort claims arising out of or in connection with the Loan occurring prior to the date of the Bank’s signature on this Agreement (including, but not limited to, failure(s) to make payment(s) on the Note as and when required, questionable allocations of funds, misrepresentations to the Bank, and other failures to perform their duties or obligations under the Loan Documents) . . . [emphasis added].

3. After Tim Patrick Was Appointed As “Private Receiver” Under The Workout Agreement, Substantial Problems Arose As A Result Of His Relationship With East West Bank And East West Bank’s Opposition To The Workout Agreement

At Charter Bank’s insistence,² Tim Patrick of Real Estate Recovery Services, LLC was appointed as the “Private Receiver” under the Workout Agreement [CP 641, 672]. As Private Receiver, Mr. Patrick was in charge of completing construction and selling the townhomes, all

² Charter Bank insisted that Mr. Patrick or someone named Jack Rader serve as Private Receiver [CP 672]. Mr. Rader was unwilling or unable to do so; therefore, First Church had to accept Mr. Patrick as the Private Receiver [CP 641, 672].

of which should have been relatively simple and resulted in First Church profiting in the range of \$1,500,000 - \$3,000,000 [CP 640 - 41].

Two big problems arose, however. First, after United Commercial Bank failed and was taken over by the FDIC, East West Bank acquired United Commercial Bank's interest in the loan to First Church [CP 113, 123, 641]. As part of the acquisition, the FDIC guaranteed East West Bank that it would not lose money on the loan (the "Loss Sharing Agreement") [CP 755, 765]. Shortly after the Workout Agreement was signed, Heath McLellan (from Charter Bank) told Joel Lavin (of First Church) that East West Bank was furious with Charter Bank for signing the Workout Agreement, as it wanted Charter Bank to foreclose on the Property (presumably because the Workout Agreement violated the Loss Sharing Agreement) [CP 113, 123, 756, 778]. As a result, according to Mr. McLellan, East West Bank was making things extremely difficult for Charter Bank on the loan [CP 755, 778].

The second problem was that Mr. Patrick advised First Church that he performed a substantial amount of work for East West Bank [CP 641]. When First Church learned this, it was understandably concerned that Mr. Patrick might not be a fair and impartial Private Receiver [CP 641]. Mr. Patrick acknowledged to First Church that he had a conflict of

interest [CP 641] and said in an email that he would seek a conflict waiver from East West Bank [CP 677]. Significantly, Mr. Patrick did not - or could not - obtain such a waiver [CP 641]. The situation was so uncomfortable for Mr. Patrick that he retained private counsel and told this attorney - Diana Carey of Karr Tuttle Campbell - that his situation at First Church was a mess and he did not want to continue as Private Receiver [CP 756, 765].

4. Charter Bank - Not First Church - Was Obligated To Pay The Private Receiver Under The Workout Agreement

Paragraph 8.4 of the Workout Agreement [CP 652] expressly provides that Mr. Patrick “shall be paid by the Bank” from the \$1,150,000 in Sacotte’s Pledged Funds held by the Bank:

The fee statements of the Private Receiver and his in-house accountants (to be billed at no more than \$50 per hour), or of his accounting professionals, if any, shall be submitted jointly to First Church and to the Bank for their respective review. Compensation of the Private Receiver and his accounting professionals, if any, shall be paid by the Bank by the withdrawal of funds from the Pledged Accounts for that purpose [emphasis added].

As set forth below, this clause is critical in evaluating who breached the Workout Agreement.³

³ First Church signed a “Terms of Engagement” letter with the Private Receiver [CP 685]. However, this agreement does not specify whether the Bank or First Church was supposed to issue checks to Mr. Patrick.

C. **For Reasons That Are Still Not Known And Are In Substantial Dispute, Patrick Abruptly And Without Any Warning Resigned As Private Receiver**

Under the Workout Agreement, Mr. Patrick was entitled to be paid a \$10,000 retainer [CP 651-52]. According to Charter Bank, Mr. Patrick sent First Church a June 2, 2010 invoice for this \$10,000 [CP 693]; First Church, however, did not receive the invoice [CP 641]. There is no evidence in the record regarding how or when Mr. Patrick may have sent the invoice because Charter Bank never submitted a declaration from Mr. Patrick. Because there is no testimony from Mr. Patrick, there is also no direct evidence of why Mr. Patrick would have sent the invoice to First Church when the Workout Agreement expressly provides he “shall be paid by the Bank” [CP 652].

Between June 3 and June 26, Mr. Patrick and First Church exchanged numerous emails; during this time, Mr. Patrick never mentioned his invoice and First Church knew nothing about it [CP 642]. In a June 27 email [CP 695], Mr. Patrick asked First Church for the first time [CP 642] why his retainer had not been paid. Believing that Charter Bank was issuing a check to Mr. Patrick [CP 642], as it was required to do under the Workout Agreement [CP 652], First Church stated “You may want to ask Heath [McLellan from the Bank] why he didn’t pay you.

The Bank is cutting all checks” [CP 697-98].

Mr. Patrick responded on June 28, saying this was “Not so” because Charter Bank had paid First Church with a draw request that covered his retainer [CP 698]. Realizing that Charter Bank might not be paying Mr. Patrick even though this was the process set forth in the Workout Agreement, and wanting to avoid any problems or misunderstandings, First Church told Mr. Patrick “We can pay you if you send us an invoice” [CP 700]. The next day, June 30, Mr. Patrick emailed the invoice and a W-9 form to First Church [CP 700]. Significantly, neither the invoice [CP 693] nor the email [CP 700] state when payment was due and Mr. Patrick never advised First Church that payment had to be made by a particular date [CP 642].

Between July 1 and July 6, Mr. Patrick and First Church exchanged numerous emails - none mentioned the invoice [CP 642]. On July 7, only four business days after First Church received the invoice, and without any warning or explanation [CP 642], Mr. Patrick notified First Church that he was resigning, “effective immediately” [CP 703]:

Pursuant to the terms of engagement between First Church LLC and Real Estate Recovery Services, LLC, dated April 21, 2010, Real Estate Recovery Services, LLC hereby exercises its right to resign as Private Receiver effective immediately. Real Estate Recovery Services, LLC is owed for services provided including administrative costs, which

will be billed under separate cover [CP 681].

Contrary to his email, Mr. Patrick never invoiced First Church for his services or costs even though he was Private Receiver for approximately 11 weeks [CP 756, 765].

Paragraph 7.1.3.1 of the Workout Agreement [CP 650] provides in relevant part:

If, however, the Private Receiver shall resign or shall cease to serve as Private Receiver hereunder, for any reason other than as set forth in Subsection 7.1.3 above, including by reason of death or disability, then the Bank will provide to Borrower the names of two other candidates to act as the successor Private Receiver under this Agreement and the Borrower will choose and retain one of them and will so notify the Bank

First Church sent emails to Charter Bank on July 8 [CP 705] and July 9 [CP 707], asking the Bank to “provide the names of two new candidates to replace Mr. Patrick as Private Receiver” [CP 705]. Charter Bank did not respond [CP 642]; instead, in a Notice of Termination of Forbearance Agreement dated July 20, 2010, it terminated the Workout Agreement, saying Mr. Patrick had resigned due to First Church’s failure to pay the retainer [CP 683].

The Bank’s Notice ignored, among other things, that the Bank was obligated to pay Mr. Patrick under the Workout Agreement [CP 652], Mr. Patrick had a conflict of interest [CP 641] and failed to obtain a conflict

waiver from East West Bank [CP 677], Mr. Patrick never stated in his invoice [CP 693], emails [e.g., CP 700] or otherwise [CP 641-42] when the invoice had to be paid, and Mr. Patrick had abruptly resigned, without warning and without any explanation⁴ [CP 642, 681, 703].

D. After Kevin Hanchett Of RTC Was Appointed As General Receiver, RTC's Website Stated That Charter Bank Was A "Client" And Bank Officers Were "References"

Charter Bank filed this action on July 20, 2011 [CP 1] and on July 26, 2011 it moved for a general receiver to take over First Church, complete the Project, and sell the townhomes [CP 54]. Charter Bank requested that Kevin Hanchett of RTC be the Receiver [CP 58-59]. Hanchett is an attorney and, in his declaration in support of the Bank's motion, said he would also serve as the attorney for the Receiver [CP 65]. On September 14, 2011, Judge Regina Cahan granted the motion and appointed Hanchett as General Receiver [CP 179].

While the receivership was pending, when it was obvious that Charter Bank and First Church and its members were adversaries,

⁴ The Bank's Notice of Termination also ignored that it breached the Workout Agreement by failing to use Sacotte's Pledged Funds to pay the \$306,752.28 that First Church had requested for work performed under the Workout Agreement. Instead of using these funds to pay First Church and the entities who worked on the Project, as it committed to do under the Workout Agreement, the Bank seized the nearly \$1,000,000 in remaining Pledged Funds and kept this money for itself. [CP 626, 642].

numerous statements appeared on RTC's website that cast grave doubt on whether Hanchett was truly a neutral and disinterested receiver. For instance, according to the website:

1. "Clients" of RTC include Charter Bank, Boston Private Bank (who purchased Charter Private Bank), and Pathfinder Funds (whose related entity purchased the Note from the Bank)⁵ [CP 776, 855],

2. "References" [CP 774, 853] include Susan Gates, an officer of Charter Bank, who was intimately involved in the Project and on the Bank's list of potential trial witnesses [CP 758, 765]; Heath McLellan of Charter Bank, who submitted a declaration in support of Hanchett's motion to approve the settlement and was listed as a potential trial witness for the Bank [CP 758, 765]; and Mitch Siegler, Senior Managing Director of Pathfinder Funds [CP 758, 765], and

3. In an interview, in response to a question about how he got involved in the Project, Hanchett stated: "My company was appointed by the Bank to come and help with the developer who had stalled out on this

⁵ Lest there be any doubt about the significance of being a "Client," the website states that RTC and Hanchett are "*totally focused on our client's priorities. First we identify the Client's goals, then we listen to their needs, finally we create innovative solutions*" [CP 773, 852] [italics in original].

project” [CP 849] [emphasis added].⁶

In light of the statements on the RTC website, and because Hanchett was a partner in the Lasher, Holzapfel and Sperry law firm, Sacotte requested that the trial court require Hanchett to disclose whether he or the Lasher law firm represented or had dealings with Charter Bank, its successor Charter Private Bank, Boston Private Bank, or any executives in these entities [CP 759]. The trial court, however, did not require Hanchett to make any disclosures.

E. Although The Bank Had Fully And Finally Released All Claims That Arose Prior To April 21, 2010, It Alleged A Claim For Diversion Of Loan Proceeds That Had To Have Arisen Prior to 2009

In addition to asserting that First Church was owed approximately \$9,100,000 under the Note and Deed of Trust [CP 538], Charter Bank alleged that First Church and its members had diverted \$938,185 of loan proceeds [CP 148, 278]. This claim, which Charter Bank had asserted prior to the Workout Agreement, was based on an entry in First Church’s 2008 tax return [CP 148, 288]. According to Charter Bank, the entry

⁶ The close relationship of Hanchett and Charter Bank can also be seen by the fact that although he is a practicing attorney, Hanchett sometimes submitted his own pleadings on the pleading paper of the Bank’s counsel [e.g., CP 850, 860-63].

shows that \$938,185 was diverted because so-called “Sacotte-controlled entities” owed this amount to First Church [CP 288].

Because the alleged diversion was based on First Church’s 2008 tax return, the claim had to have arisen prior to December 31, 2008. As such, it was plainly barred by the Release in the Workout Agreement [CP 653], where Charter Bank agreed to fully and finally release all claims - known or unknown - that arose before April 21, 2010. According to Vincent Depillis, the attorney representing First Church in the negotiation and drafting of the Workout Agreement, “This is the type of allegation that the Bank made prior to execution of the Workout Agreement and is precisely the type of claim that the Release was intended to cover” [CP 780].

Moreover, the same persons who prepared the 2008 tax return - certified public accountant Jeff Mock and bookkeeper Mary Stice [CP 756, 765] - prepared a Balance Sheet dated August 31, 2011 [CP 743 - 744] that updated First Church’s financial situation [CP 643]. According to the Balance Sheet [CP 743 - 744], as of August 31, 2011, First Church was not owed any money by the entities identified in the 2008 tax return [CP 629, 643].

F. The Trial Court Denied The Bank's Motion For A Declaratory Judgment Regarding The Alleged Diversion Of Funds Because There Were Genuine Issues Of Material Fact

On April 4, 2011, Charter Bank filed a motion seeking a declaratory judgment that, among other things, the purported diversion of \$938,185 violated the loan agreement [CP 277]. Sacotte's response asserted a number of defenses, including (1) the claims were barred by the Release in the Workout Agreement and (2) the entities identified in the 2008 tax return no longer owed any money to First Church [CP 483 - 495]. In an Order dated June 13, 2011 [CP 511], Judge Mariane Spearman denied Charter Bank's motion, finding "there exists genuine issues of material fact" [CP 512].

G. The One-Sided Settlement Agreement That Hanchett Negotiated With The Bank On Behalf Of First Church, Which Gave The Bank Everything And First Church And Its Creditors Nothing, Was Approved By The Trial Court

Just one month later, on July 13, 2011, Hanchett filed a motion [CP 52] requesting the trial court to approve a settlement he had entered into with Charter Bank on behalf of First Church. Under the settlement, First Church released its seven figure claim against Charter Bank in exchange for the Bank (1) paying the nominal amount of \$10,000 to First Church and (2) dismissing its claim for diversion of loan funds [CP 524]. In many respects, Hanchett's motion was a "re-do" [CP 627] of the

Bank's motion for a declaratory judgment [CP 277], which Judge Spearman denied because there were "genuine issues of material fact" [CP 524].

Hanchett's motion represented that he "spent a substantial amount of time with both Sacotte and the Bank discussing the merits of the claim" [CP 523] and that "the settlement and compromise is in the best interests of creditors and the receivership estate" [CP 524]. In fact:

1. Hanchett did not have any substantive communications with Sacotte or his counsel regarding the claims [CP 621, 638, 640],
2. At the September 23, 2011 hearing, Hanchett acknowledged the \$10,000 would be paid to him - not First Church [RP 7]. This was not disclosed in the settlement agreement [CP 535], Hanchett's motion [CP 520], Hanchett's declaration [CP 531], or the Bank's declaration [CP 537],
3. The claim for diverted funds had no merit because, among other things, the Bank had released the claim in the Workout Agreement [CP 618 - 631, CP 752 - 760]. This meant that First Church would receive literally nothing for being forced to give up its seven figure claim against the Bank,
4. Non-bank creditors (primarily lien claimants, who had not

been paid for their work on the Project) would not receive one cent from the receivership if the settlement was approved; in contrast, these creditors would be paid in full or almost in full if First Church prevailed on its claims against the Bank [CP 626, 757],

5. Charter Bank - a “Client” of RTC [CP 776, 855] - was the only entity that stood to benefit from the settlement [CP 618 - 631],

6. Many material facts were in dispute, the record was limited (e.g., no live testimony, no declaration from Mr. Patrick), and the fact-finding process had just begun [CP 618 - 31, 752 - 760], and

7. No possible harm would have come from denying the motion and allowing First Church to proceed with its claims [CP 620].

Despite the above, Judge Spearman approved the settlement [CP 748], denied Sacotte’s motion for reconsideration [CP 786], dismissed First Church’s counterclaims against Charter Bank [CP 781] and, later, discharged the general receiver and terminated the case [CP 912]. As set forth below, these rulings were in error.

During the receivership, the twelve townhomes sold for a total of \$10,269,750 [CP 1383]. However, as Sacotte had argued [CP 626, 757], First Church and all of its creditors received nothing from these proceeds [CP 1383 - 1385].

IV. SUMMARY OF ARGUMENT

A court-appointed receiver is obligated to obtain all value that might benefit the estate. By settling with Charter Bank for only \$10,000 - all of which went to him - Hanchett did literally nothing for the estate and its non-bank creditors.

Making the situation worse is the apparently close connection between Hanchett and Charter Bank. That is, the very person charged with vigorously pursuing all avenues of recovery on behalf of First Church had conflicted allegiances because he regarded the Bank and the other financial institutions as “Clients” and their officers as “References.” Thus, in reality, how vigorously did Hanchett evaluate First Church’s claims against the Bank when he so clearly valued his relationship with that very same Bank

What raises the most suspicion is that while the settlement did literally nothing for First Church and its non-bank creditors, it did wonders for Charter Bank, freeing the Bank from answering to a seven figure claim. Such a highly unusual outcome bears careful review because, on its face, Hanchett was serving Charter Bank at the expense of First Church and its non-bank creditors, whose interests Hanchett was also obligated to advance.

Were that not enough, the trial court erred by making findings on critical facts where the record was limited, the fact-finding process had just begun, and the evidence was in substantial dispute. This runs counter to the trial court's June 13, 2011 Order, which refused to grant a dispositive motion based on similar facts because "there exist genuine issues of material fact." Further, there was no good reason not to let First Church pursue its claims against the Bank.

Untangling the complex undertakings and relationships present in this case was not susceptible to summary adjudication, particularly in light of Hanchett's apparently close relationship with Charter Bank. The existing record neither supports the action taken by the trial court, nor sufficiently informs this Court of the facts, motivations, and relationships which brought the present dispute to court.

This Court should reverse the trial court's approval of the one-sided settlement - which gave First Church and its non-bank creditors nothing while insulating Charter Bank from everything - because there is not "a sufficient factual foundation" to establish that the agreement was "fair and equitable."

V. ARGUMENT

A. This Court Should Reverse The Trial Court’s Order Approving The One-Sided Settlement Agreement Because There Is Not “A Sufficient Factual Foundation” To Establish That The Agreement Was “Fair And Equitable”

1. Standard Of Review

Appellants are not aware of any Washington cases where the trial court approved a receiver’s proposed settlement and an appellate court reviewed the trial court’s decision. However, bankruptcy court cases provide guidance, and cases from the Ninth Circuit Court of Appeals are set forth below.

“The bankruptcy court has great latitude in approving compromise agreements.” In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

“However, the court’s discretion is not unlimited. The court may approve a compromise only if it is ‘fair and equitable.’” Id. [quoting In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986)].

In deciding whether a compromise is “fair and equitable,” the trial court “must” consider the following four factors:

- (a) The probability of success in the litigation;
- (b) the difficulties, if any, to be encountered in the matter of collection;
- (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;
- (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id. [quoting A & C Properties, 784 F.2d at 1381]. The trustee “has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved.” A & C Properties, 784 F.2d at 1381.

If a bankruptcy court approves a trustee’s proposed compromise, the court’s decision “is reviewed for an abuse of discretion.” Id. at 1380.

However:

An approval of a compromise, absent a sufficient factual foundation which establishes that it is fair and equitable, inherently constitutes an abuse of discretion.

Id. at 1383 [emphasis added]. See also In re Planned Protective Services, Inc., 130 B.R. 94, 96 (Bankr. C.D. Cal. 1991) (trial court should not rubber-stamp a proposed compromise).

In re Woodson, 839 F2d. at 610, relied upon by Hanchett below [CP 525, 526], is a leading Ninth Circuit case. There, Woodson filed a personal bankruptcy and his company filed a Chapter 11 bankruptcy. Woodson received \$1,000,000 from his wife’s life insurance policy, and a dispute arose over whether the proceeds were exempt from creditors, whether a creditor in the personal bankruptcy had filed a timely objection to the exemption and, if not exempt, whether the proceeds should go to creditors in the personal bankruptcy or the corporate bankruptcy. Id. at 612-13.

Woodson and a trustee managing property in the corporate bankruptcy and an attorney representing creditors in the corporate bankruptcy agreed on a compromise. Under the agreement, \$100,000 would go to the corporation's creditors and the remaining \$900,000 would go to Woodson himself - creditors in Woodson's personal bankruptcy, including Fireman's Fund (who objected to the exemption), would get nothing. The bankruptcy court approved this settlement. *Id.*

On appeal, the Ninth Circuit reversed, holding the settlement was not fair and equitable:

The agreement it approved was not a compromise but a complete rejection of Fireman's Fund's claim. The so-called compromise allocated \$100,000 of the \$1 million to the company's creditors and the remaining \$900,000 to Woodson himself. Woodson's personal creditors were given nothing. Even if the bankruptcy court believed that Fireman's Fund's objection was unmeritorious or untimely, it should have recognized that Fireman's Fund had some probability of ultimate success on its claim, and therefore that Woodson's personal creditors had some entitlement to the \$1 million. . . . No responsible trustee would have proposed as "fair and equitable" a compromise that gave \$900,000 to the debtor and not a cent to his creditors.

Id. at 620 [italics in original] [emphasis added]. See also *In re MGS Marketing*, 111 B.R. 264, 268 (9th Cir. B.A.P. 1991) (reversing settlement approved below); *Planned Protective Services*, 130 B.R. at 98 (reversing settlement approved below because not fair and equitable to creditors).

2. None Of The Rationales Offered By Hanchett Support The One-Sided Settlement And The Trial Court Made Findings On Critical Facts Where The Record Was Limited. The Fact-Finding Process Had Just Begun. And The Evidence Was In Substantial Dispute

A. The \$10,000 Payment Rationale

Hanchett claimed that the settlement would “bring money into the estate” [CP 520]. This representation was false, as Hanchett and Charter Bank apparently had a side agreement that the \$10,000 would go to Hanchett for arranging the settlement and seeking court approval [RP 7]. That Hanchett - and not First Church - would be paid the \$10,000 was not disclosed in any pleading that Hanchett or Charter Bank submitted in support of the motion. Surprisingly, the trial court was not troubled by any of this.

B. The Claims Are “Legally and Factually Weak” Rationale

Hanchett asserted that First Church’s claims against Charter Bank were “legally and factually weak” [CP 526]. However, Hanchett mischaracterized or misunderstood these claims, saying they were based on “the selection of the Private Receiver” [CP 526]; in fact, as set forth above, First Church’s claims are based on Charter Bank’s wrongful termination of the Workout Agreement. Hanchett also erred in alleging

that First Church's claim was for \$14,000,000⁷ [CP 527]; as set forth above, the claim is for \$1,500,000 - \$3,000,000. It is not surprising that Hanchett made these mistakes, as he never discussed the claims with Sacotte or his counsel.

At least two critical facts regarding the merits of First Church's claim against the Bank were hotly contested: (1) Who was required to pay the \$10,000 retainer to Mr. Patrick, and (2) Why did Mr. Patrick resign. Because the facts and the inferences therefrom⁸ were disputed, the record was limited, and the fact-finding process had just begun, it was error for the trial court to find that First Church's claims had no merit whatsoever. A & C Properties, 784 F.2d at 1382 (there "can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of

⁷ Sacotte's reference to \$14,000,000 in the schedules refers to the approximate value of the Project, not the amount of First Church's claim against the Bank [CP 626].

⁸ For instance, if Mr. Patrick resigned as a result of his conflict and the opposition of East West Bank to the Workout Agreement, this would explain the peculiarities surrounding the resignation: why he resigned without warning, why he failed to state the reason for his resignation, why he never billed First Church for his service as Private Receiver, and why Hanchett and the Bank never submitted a declaration from him.

ultimate success should the claim be litigated”) [quotation omitted].

Notably, in A & C Properties, unlike here, the trial court held hearings and heard live testimony before approving a settlement. Id. at 1381.

It was also error for the trial court to approve a settlement where, like the creditors in Woodson, First Church and its creditors did not receive one cent for their claims. Even if the trial court believed, on the limited record before it, that First Church’s claims had no merit, it should have recognized that, at a minimum, First Church “had *some* probability of ultimate success on its claims” and that the settlement value of the claims was plainly more than zero. Woodson, 839 F.2d at 620 [italics in original].

C. The Bank’s Diversion Of Funds Claim Rationale

Hanchett alleged that First Church “would face probable exposure” on Charter Bank’s claim for diversion of funds [CP 528]. This ignores the Release in the Workout Agreement, where the Bank fully and finally released any claim it might have that arose prior to April 21, 2010. The Release includes the Bank’s diversion of funds claim because that claim arose prior to December 31, 2008.

Judge Spearman ruled the Release was of no effect because she found that First Church had breached the Workout Agreement [RP 15-16,

22, 26, 27]. This was error because, among other things: (1) The Bank - not First Church - breached the Workout Agreement. At a minimum, this issue was in substantial dispute; (2) The Release expressly states the Bank has fully and finally released such claims. See Paragraph 9.1(ii), which begins “The Bank hereby irrevocably and unconditionally forever releases, remises, acquits each of the Borrower/Guarantor/Pledger Parties” [emphasis added]; and (3) It is completely at odds with the intent of the parties when they drafted the Workout Agreement and the Release. According to Vincent DePillis, who represented First Church in the negotiation and drafting of the Workout Agreement:

The parties did not intend for the Release to be of no effect if the Workout Agreement was breached; rather, their intent was that if First Church breached the Agreement, the Bank would no longer have to forbear from collecting the amounts owed under the Note [CP 780].

The trial court also erred by finding that the August 31, 2011 Balance Sheet should be completely disregarded [RP 23] (“I have some concerns about the bookkeeping here, how that - - these figures are arrived at”). This Balance Sheet, which Sacotte submitted in response to Hanchett’s motion, shows that all amounts owed by the so-called “Sacotte-controlled entities” had been repaid and were properly reconciled. The Balance Sheet was credible because it was prepared by

the same people who prepared the 2008 tax return and was submitted under penalty of perjury. There was no valid reason for the trial court to reject the Balance Sheet, particularly at that stage of the proceedings.

Finally, the Bank would be double-dipping if it were permitted to recover the \$938,185. The Bank alleged it was owed \$9,159,145.89, which is the amount of loan proceeds it disbursed to First Church [CP 538]. This \$9,159,145.89 includes the \$938,185 in loan proceeds that the Bank says were diverted. Because the Bank cannot collect the same money twice, it has no right to the \$938,185.

D. The “Risk And Cost Of Further Litigation” Rationale

The “complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it” “must” be considered by the trial court when evaluating a proposed compromise. Woodson, 839 F.2d at 620. Hanchett’s motion claimed the settlement would eliminate the “risk and cost of further litigation” to First Church and its creditors [CP 534]. This was not true because Sacotte - not First Church - had retained counsel to pursue the claims against Charter Bank and defend against the Bank’s claim for diversion of funds. As a result, First Church had not incurred - and would not incur - any fees or costs in any litigation with Charter Bank. The trial court did not consider this factor

when it approved the settlement.

E. The “Facilitate The Ability Of The Note Sale To Proceed” Rationale

Hanchett’s motion stated he had located a buyer “for the Note who would also fund the cost to complete and market the Project” [CP 523]. According to Hanchett, the settlement would “facilitate the ability of the Note sale to proceed” [CP 523].

Before the trial court heard the motion, which Hanchett had to re-note from July 22, 2011 to September 23, 2011 [CP 585] to comply with RCW 7.60.190(6), the sale of the Note closed and construction on the Project resumed. Thus, contrary to Hanchett’s motion, settlement of First Church’s claims was not necessary for the sale of the Note. Further, because First Church’s claims would have had no effect on construction of the Project and sale of the townhomes, no possible harm would have come from the court denying the motion and allowing First Church to pursue its claims. *Id.* (delay of proceedings is a factor in determining whether compromise is fair and equitable).

F. The “Will Ultimately Benefit All Creditors” Rationale

Hanchett’s motion claimed the settlement “will ultimately benefit all creditors” [CP 520]. This was not true: based on the expected sales

prices of the townhomes, it was clear that none of the sales proceeds would go to the non-bank creditors. Thus, the only hope of non-bank creditors to recover any funds in the receivership was for First Church to prevail on its claims against the Bank. And as events ultimately proved, this is exactly what occurred: non-bank creditors did not get a cent from the receivership because Hanchett's settlement with the Bank was approved. It was error for the trial court to ignore the interests of these creditors. Id. (trial court "must" consider "paramount interests" of creditors in determining if settlement is fair and equitable); A & C Properties, 784 F.2d at 1384 ("bankruptcy court is obligated to preserve the rights of the creditors").

G. Summary

None of the rationales offered by Hanchett in favor of the settlement have any merit. Further, the trial court's findings on critical facts, on a limited record, ignored substantial facts to the contrary or were flatly incorrect. Therefore, there is not "a sufficient factual foundation which establishes that [the proposed settlement was] fair and equitable" and it was an abuse of discretion for the trial court to have approved the one-sided settlement. Id. at 1383. Woodson, 839 F.2d at 620 (reversing approval of settlement that gave no money to creditors).

B. The Trial Court Erred By Deferring To Hanchett's Assertions Regarding The One-Sided Settlement Agreement And By Failing To Require Hanchett To Make Disclosures In Light Of The Evidence Showing Hanchett Had Close Ties To The Bank And Was Not Acting As A Neutral Receiver

A court-appointed receiver may not be beholden to or favor one party over another. Rather, the receiver:

is uniformly regarded as an officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest (emphasis added).

Gloyd v. Rutherford, 62 Wn.2d 59, 60-61, 380 P.2d. 867 (1963) (citation omitted); Suleiman v. Lasher, 48 Wn. App. 373, 379, 739 P.2d 712 (1987) (same).

Here, Hanchett represented to the trial court that “I do not have a dog in this fight” [RP 8] - in other words, that he was a neutral and disinterested receiver, acting for the common benefit of all parties in the action. Judge Spearman accepted this representation at face value and gave substantial deference to Hanchett's arguments and recommendations:

And as Mr. Hanchett has said, he's the receiver and he doesn't have a dog in this fight. And he's supposed to be - his job is to be doing what's really in the interest of getting this issue resolved. You know, not for the bank and not necessarily for Mr. Sacotte either. So unless anyone has anything else to say, I'm going to approve the settlement.

[RP 23]. This, however, ignored the realities of the situation: the Bank had facilitated Hanchett's appointment as receiver and if Hanchett acted in a way that pleased the Bank, this would make it more likely that the Bank - and other banks - would want him to serve as a receiver in the future. It is no coincidence that all of the "Clients" listed in RTC's website are banks and financial institutions [CP 776, 855].

Any doubts that Hanchett was biased in favor of the Bank were erased by the statements that appeared on RTC's website, while this action was pending. These brazen statements - the Bank is a "Client," Bank officers are "References," and the Bank "appointed" Hanchett to complete the Project - cast obvious doubt on whether Hanchett was truly acting "for the common benefit of all parties" in the action. Gloyd, 62 Wn.2d at 60-61; Suleiman, 48 Wn. App. at 379. For some reason, the trial court was not troubled by these statements and never inquired of Hanchett about them.

In light of the one-sided settlement and the statements on the RTC website, the trial court should have required Hanchett to disclose whether he or the Lasher law firm represented or had any dealings with Charter Bank, Charter Private Bank, Boston Private Bank, Pathfinder, or its executives. See Bankruptcy Rule 2007.1(c), which requires a

prospective trustee in a Chapter 11 bankruptcy to submit:

a verified statement . . . setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

See also Bankruptcy Rule 2014, which requires prospective attorneys (a hat also worn here by Hanchett) to submit an application setting forth "all of the person's connections with the debtor, creditors, [and] any other party in interest."

VI. CONCLUSION

This Court should reverse the trial court's order approving the one-sided settlement that Hanchett negotiated with the Bank and allow First Church to pursue its seven figure claim against the Bank.

November 1, 2013 **FINKELSTEIN LAW OFFICE, PLLC**

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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION ONE**

CHARTER PRIVATE BANK, f/k/a CHARTER)
BANK, a Washington state-chartered bank,)
Respondent,)

NO. 70208-4

vs.)

DECLARATION OF SERVICE

JOSEPH J. SACOTTE, individually and the)
marital community of JOSEPH J. SACOTTE)
and MIDORI SACOTTE; JOEL J. LAVIN and)
JANE DOE LAVIN; and FIRST CHURCH,)
LLC, a Washington limited liability company,)
Appellants.)

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the date below I caused copies of the following documents: (1) Brief of Appellants Sacotte and (2) this Declaration of Service to be served upon the following persons in the manner provided below:

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DECLARATION OF SERVICE

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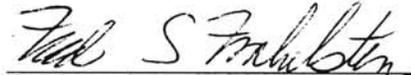
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